No. 89-1756

MAY 10 1990

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IN THE
# Supreme Court of the United States
OCTOBER TERM 1989

ROYAL CROWN COLA CO.,
*Petitioner,*

vs.

THE COCA-COLA COMPANY, DR PEPPER CO., and PEPSICO, INC.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT


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## Questions Presented

1. Does the existence of concurrent Government and private antitrust actions place a heavier causal burden upon a successful private plaintiff seeking an attorney's fee under Section 16 of the Clayton Act than that imposed in the absence of a Government action?

2. Is a plaintiff seeking an attorney's fee under Section 16 of the Clayton Act, based upon defendants' voluntary abandonment of their illegal conduct in the face of concurrent private and Government actions, required to demonstrate that its private action, rather than the Government's action, both was necessary and provided controlling judicial relief as opposed to a substantial factor or catalyst as normally required?

3. When antitrust defendants, faced with injunctive litigation from both a private plaintiff and the Government, abandon their illegal action admittedly in response to the litigations, can a district court make an attorney's fee award under Section 16 of the Clayton Act without direct evidence of subjective motivation that distinguishes between the concurrent litigations?

4. When a private plaintiff obtains a result that would justify an attorney's fee under Section 16 of the Clayton Act in the absence of a concurrently pending Government action, does the existence of that Government action permit the court of appeals to impose new legal standards and analyze the record below without remand, drawing inferences from the record contrary to those drawn by the district court?

## List of Parties

Petitioner is Royal Crown Cola Co.* Respondents are The Coca-Cola Company, Dr Pepper Co., and PepsiCo, Inc.

* As required by Rule 29.1 of this Court, petitioner states that its parent company and subsidiary consist of Chesapeake Financial Corporation and The Bev-Rich Company respectively.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Royal Crown Cola Co. ("Royal Crown") respectfully prays that a writ of certiorari issue to review the judgment and opinion in the above-captioned action of the United States Court of Appeals for the Eleventh Circuit entered November 13, 1989.

### Opinions Below

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 887 F.2d 1480 (11th Cir. 1989) and is reprinted in the Appendix. (App. A1.) The memorandum decision of the United States District Court for the Middle District of Georgia (Elliot, J.), finding petitioner Royal Crown entitled to an award of attorneys' fees pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26 (1988) ("Section 16"), is unreported and is reprinted in the Appendix. (App. A31.) The decision of the United States District Court for the Middle District

of Georgia (Elliot, J.) entering an award of attorneys' fees in favor of petitioner Royal Crown is reported at 678 F. Supp. 875 (M.D. Ga. 1987) and is reprinted in the Appendix. (App. A39.)

## Jurisdiction

The United States Court of Appeals for the Eleventh Circuit entered its original judgment on November 13, 1989. Petitioner sought rehearing by the panel and rehearing *en banc*, which were denied on February 10, 1990. (App. A54.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

## The Statute Involved

Section 16 of the Clayton Act, 15 U.S.C. § 26 provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV

> of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

## Statement of the Case

This Petition for Writ of Certiorari addresses entitlement to a fee award under Section 16 when the petitioning plaintiff and the Government prosecute separate but concurrent lawsuits against a proposed acquisition and defendants voluntarily abandon the acquisition concededly due to litigation. The district court found that Royal Crown's litigation was a causal link in defendants' capitulation and awarded it an attorney's fee, despite the existence of a concurrent suit by the Federal Trade Commission (the "FTC"). Defendants admitted that litigation as a whole caused the abandonment of the transactions. The district court also focused on the remarkable chronology of events that the district court itself had witnessed. These bases would clearly have been sufficient to sustain the fee award under existing precedent, despite defendants' claims of alternative causes of abandonment of the transactions.

The Eleventh Circuit Court of Appeals reversed the district court's decision. The court raised the legal standard by requiring that plaintiff demonstrate that its lawsuit was "necessary" and the "controlling relief," as opposed to a "substantial factor" or "catalyst," a lesser standard, simply because concurrent litigation existed. The court further required evidence of subjective motivation for entitlement to attorneys' fees. Finally, the court applied the new legal standards, instead of remanding, and in doing so, drew its

own inferences, contrary to those of the district court, in contravention of its proper appellate role.

The implications of the court of appeals' decision reach beyond the context of concurrent private and governmental antitrust enforcement. The holding creates severely dangerous precedent to a plaintiff's entitlement to a fee award in any action—antitrust, civil rights or otherwise—in which the Government or a second plaintiff has prosecuted a concurrent action seeking the same result.

**A. Factual Background**

On January 24, 1986, PepsiCo, Inc. ("PepsiCo") announced its intent to acquire the Seven-Up Company ("Seven-Up") from Philip Morris Incorporated ("Philip Morris") for $380 million. On February 20, 1986, The Coca-Cola Company ("Coca-Cola") announced its intent to acquire Dr Pepper Co. ("Dr Pepper") for $470 million. If consummated, the PepsiCo/Seven-Up acquisition and the Coca-Cola/Dr Pepper acquisition (collectively, the "Acquisitions" or the "Transactions") would have controlled more than 75% of the soft drink market and severely threatened the existence of Royal Crown.

Following the announcement of each of the Transactions, Royal Crown began to evaluate their potential competitive effects, including the interactive effects, on the soft drink market and the third-bottler network. The Federal Trade Commission also was evaluating the competitive effects of the Acquisitions on behalf of the Government, pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18A (1988). Since the FTC's evaluation and its communications with the parties to the Acquisitions were confidential, Royal Crown was never certain of the progress or substance of the FTC's assessments. Nor did Royal Crown know whether the FTC had reached agreements with

the parties to postpone their closing to a date certain, and if so, the substance of such agreements.

On June 19, 1986, given the extreme importance of the issues at stake and its uncertainty as to the FTC's intentions, Royal Crown filed a Verified Complaint and a Motion for a Temporary Restraining Order ("TRO") in the Middle District of Georgia to enjoin both Acquisitions under Section 16.[1] (App. A33.) Royal Crown obtained its TRO the following day after submission of lengthy opposition papers and an extended oral presentation of vigorous objections by all four parties to the Acquisitions. A preliminary injunction hearing was scheduled for June 30, 1986, and Royal Crown immediately began comprehensive and expedited discovery. (App. A34.) On June 23, 1986, just three days after Royal Crown had commenced intensive discovery, defendants Philip Morris, Seven-Up, and PepsiCo abandoned their transaction.[2] (*Id.*)

When the court issued its TRO on the afternoon of June 20, 1986, the FTC still had not voted on whether to challenge the Acquisitions. Finally, later that day, the FTC decided to file suit to enjoin the Transactions. (*Id.*) Since Royal Crown's TRO was already in place, the FTC had no need to seek and, in fact, did not seek immediate judicial relief. The FTC filed its complaint on June 23, 1986 only against the Coca-Cola/Dr Pepper acquisition, since the PepsiCo/Seven-Up transaction had been abandoned earlier that day.

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[1] The basis of jurisdiction of the federal district court was 28 U.S.C. § 1337(a) (1982).

[2] Although Philip Morris and Seven-Up remained parties to Royal Crown's action for the purpose of Royal Crown's fee award application, they subsequently entered into a settlement with Royal Crown on the payment of attorneys' fees and are thus not parties to this Petition.

On June 24, 1986, Coca-Cola and the FTC appeared before the District Court for the District of Columbia to schedule a preliminary injunction hearing. Solely at Coca-Cola's request, the hearing was set for the middle of July. (*Id.*) The very next day, Coca-Cola requested the Georgia district court to adjourn its preliminary injunction hearing previously set for June 30. The court acquiesced, again, solely to accommodate Coca-Cola's *self-imposed* scheduling difficulties, but nonetheless emphasized that Royal Crown's first-filed action would retain its primacy over the subsequently-filed FTC action. (App. A35.) To ensure that primacy, the court ordered, after all parties had agreed, that Royal Crown's TRO would be continued as a full preliminary injunction until a decision on the merits of Royal Crown's claims. To expedite that decision, the court scheduled a trial on the merits for August 25, 1986. (*Id.*)

On July 31, 1986, the District of Columbia district court granted the FTC's request for a preliminary injunction against the Coca-Cola acquisition. The FTC's preliminary injunction was entirely duplicative, however, for the preliminary injunction entered by the Georgia district court on June 25 remained securely in place through Royal Crown's trial on the merits at the end of August.

Intensive discovery in Royal Crown's action resumed on July 28, 1986 and continued unabated until August 5, 1986, when Coca-Cola and Dr Pepper voluntarily capitulated in their effort to consummate their anticompetitive acquisition and thereby conceded the relief sought by both Royal Crown and the FTC. (App. A36.)

**B. The District Court's Award of Attorneys' Fees**

In August 1986, Royal Crown moved under Section 16 for an order establishing its entitlement to reasonable at-

torneys' fees. The Georgia district court, after reviewing the entire chronology of events and its own experience with respect to Royal Crown's conduct of the proceedings, found that Royal Crown had established the causal link between defendants' capitulation and Royal Crown's litigation. The court held:

> as a matter of fact that the injunctive relief obtained by Royal Crown in this action as well as Royal Crown's vigorous prosecution and discovery efforts constituted a substantial factor and a catalyst in motivating the Defendants to terminate their acquisitions, and [this court] concludes as a matter of law that in this factual setting Section 16 of the Clayton Act thus entitles Royal Crown to an award of attorney's fees and expenses.

(App. A37.)

Defendants had conceded that litigation—and not some business or other motivation—prompted their surrender. The court candidly acknowledged that "[u]ndoubtedly the parallel FTC proceeding in the District of Columbia also played a role in the abandonment" of the Acquisitions, but rejected as "unrealistic and incredible" defendants' contention that Royal Crown's private action was not among the factors motivating that decision. (App. A36.)

The district court also rejected defendants' suggestion that the FTC action that had been concurrently pending should preclude Royal Crown from recovering attorneys' fees. The court explained that to deny a private plaintiff a fee award because the Government files a later parallel proceeding contravenes Congress' clearly-stated intent to encourage private antitrust enforcement in injunctive proceedings where there are no awards of treble damages. (App. A36 n.2.)

### C. The Court of Appeals' Reversal of the Fee Award

On November 13, 1989, the Court of Appeals for the Eleventh Circuit reversed the district court's award of attorneys' fees without remanding for further factual findings and held that Royal Crown was not a " 'prevailing party' within the meaning of the Clayton Act." (App. A30.) The court nonetheless acknowledged that, when Royal Crown filed its complaint and obtained a TRO, the FTC had not yet decided whether to challenge either of the Acquisitions and that the prospect of the FTC's doing so was uncertain. (App. A25.) The court also admitted that Royal Crown's lawsuit was a " 'deserving case' on the merits," and that Royal Crown's TRO papers "support[ed] a finding that the appellants' proposed acquisitions would have had anticompetitive effects on the soft drink industry in violation of the antitrust laws." (App. A16.) The court further agreed that the Acquisitions were abandoned while subject to Royal Crown's meritorious and vigorous challenge, and that, had the FTC not challenged the Transactions, Royal Crown's suit would have posed the only obstacle to their consummation. (App. A20.)

The court of appeals nevertheless found that Royal Crown was not entitled to an attorney's fee award. Upon a reconstruction of the facts, the court analyzed whether Royal Crown's action was necessary and if it was the controlling relief when measured against the concurrent FTC suit. In so doing, the court imposed an unprecedented legal standard that is simply improper and an evidentiary burden that is virtually impossible to meet, especially in cases of complementry private and governmental enforcement. Further, to meet these newly imposed burdens, Royal Crown was required to proffer either (i) admissions from defendants that Royal Crown's suit was a substantial factor in the failure of their Acquisitions, or (ii) concessions from the

FTC that Royal Crown's actions substantially influenced its decision to challenge the Acquisitions. (App. A15.)

In assessing Royal Crown's fee entitlement under these new standards, the court concluded that Royal Crown had not successfully demonstrated that its action was either necessary or controlling. By virtue of the wholly independent acts of the FTC, and through no fault of its own, Royal Crown was thus divested of its fee award for what the court had admitted was a meritorious action. After a lengthy opinion, in which the court essentially assumed the role of fact-finder, the court of appeals reversed as clearly erroneous the district court's own factual finding that Royal Crown was a prevailing party. (App. A30.)

## Reasons for Granting the Writ

### I.

### There Is a Conflict Among the Circuits as to the Appropriate Legal Standard To Apply to a Plaintiff's Request for a Fee Award when Concurrent Lawsuits Exist.

Royal Crown sought and the district court awarded attorneys' fees on the familiar ground that Royal Crown prevailed, not by judicial decree, but because defendants abandoned their illegal conduct. The court of appeals nevertheless erroneously demanded that a private plaintiff show that it was more than just a "substantial factor" or "catalyst," as other courts have required, in motivating defendants to abandon their Transactions. Imposing a much higher burden, the court held that merely because the Transactions were so anticompetitive that the Government *also* moved against them, Royal Crown's award could not be analyzed under the usual legal standard. The court instead required

that Royal Crown's action be necessary and the controlling relief, and then required direct evidence of defendants' subjective motivation to demonstrate the causal link between Royal Crown's suit and defendants' voluntary capitulation. The court thus produced a substantial conflict among the circuits when, merely because defendants' alleged that the abandonment of their Transactions was motivated by *a concurrent lawsuit*, and not some other non-litigation-related cause, it erroneously imposed a different and higher legal standard to assess whether Royal Crown was a prevailing party.

As the Georgia district court both recognized in its opinion and reflected in its decision to grant Royal Crown its attorneys' fees, a "final judgment on the merits is not a prerequisite for an award of attorney's fees under Section 16." (App. A33.) Courts routinely award attorneys' fees to plaintiffs as "prevailing parties" without a final adjudication when defendants voluntarily abandon their wrongful conduct.[3] *See Leroy* v. *City of Houston*, 831 F.2d 576, 579 (5th Cir. 1987) (fee award appropriate even without judgment following trial), *cert. denied*, 486 U.S. 1008 (1988); *Martin* v. *Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985) (same); *Fields* v. *City of Tarpon Springs*, 721

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[3] The standard for determining whether an antitrust plaintiff "substantially prevails" under Section 16 generally conforms to the standard defining a "prevailing party" under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1982) ("Section 1988"). *See, e.g., Southwest Marine, Inc.* v. *Campbell Indus.*, 732 F.2d 744 (9th Cir.), *cert. denied*, 469 U.S. 1072 (1984); *F & M Schaefer Corp.* v. *C. Schmidt & Sons, Inc.*, 476 F. Supp. 203, 205-06 (S.D.N.Y. 1979). To the extent that the standards applicable to Section 16 and Section 1988 differ, the Section 16 standard should be more lenient. Section 16 requires only that a plaintiff "substantially prevail[ ]" in contrast to the requirement of Section 1988 that a plaintiff be a fully "prevailing party." *See Grumman Corp.* v. *LTV Corp.*, 533 F. Supp. 1385, 1388 n.7 (E.D.N.Y. 1982) (describing "substantially prevails" language of Section 16 as more lenient than the "prevailing party" standard of Section 4 of the Clayton Act).

F.2d 318, 321 (11th Cir. 1983) (plaintiff is "prevailing party" without obtaining judicial relief if "catalyst" test is satisfied); *Morrison* v. *Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980) (no formal relief required if petitioning plaintiff was "material" factor), *cert. denied*, 449 U.S. 1102 (1981); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 429 (8th Cir. 1970) (same); *see also Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

In these cases, courts of appeals, including the Eleventh Circuit, typically have found the chronology of events and such circumstances as the merit of the case to be sufficient evidence to meet the "substantial factor" or "catalyst" burden, despite defendants' claims of alternative causality. *See, e.g., Robinson* v. *Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981); *Morrison*, 627 F.2d at 671; *Nadeau* v. *Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978); *see also infra* Point II. Mindful of this precedent, the district court analyzed Royal Crown's request for attorneys' fees, and, based on the chronology of events and its own oversight of the entire proceedings leading up to defendants' voluntary capitulation, granted Royal Crown its fee award, finding that defendants' claimed alternative motivation was disingenuous. (App. A36.)

If the FTC had not brought a parallel enforcement action, the court of appeals presumably would have applied the "chronology and circumstances" test as it had done on other occasions and as had the district court in this very case. Instead, the court required both that plaintiff demonstrate that its action was necessary and provided the controlling relief, and submit direct evidence of subjective motivation to prove causality. By refusing to apply the "chronology and circumstances" test to Royal Crown's request for its attorney's fee, simply because a concurrent suit existed, the court restrictively interpreted the fee-shifting provision of Section 16 and produced a substantial conflict among the circuits.

The Fifth, First and Third Circuits have broadly applied the prevailing party standard when concurrent forces achieve the relief sought. Specifically, these Circuits have held that an award of attorneys' fees is appropriate despite the presence of concurrent actions when the petitioning plaintiff's action was a substantial factor in defendants' abandonment of illegality, as shown by the chronology of events and circumstances such as the merit of the case. Given the complete absence of interpretation of the fee-shifting provision of Section 16, guidance in clarifying the conflict between the court of appeals' decision and other circuits is acutely required.

**A. The Fifth Circuit**

In *United States* v. *Terminal Transport Co.*, 653 F.2d 1016 (5th Cir. Unit B 1981) (binding upon the Fifth and Eleventh Circuits), *cert. denied*, 455 U.S. 989 (1982), both the district court and the Fifth Circuit merely required private plaintiffs, for a fee request, to establish that their litigation was meritorious and therefore a causal link. Private plaintiffs had brought a class action under Section 1988 alleging that defendants had discriminated against blacks on the basis of race at defendants' Georgia facilities. Shortly thereafter, the Government filed a similar suit, later consolidated with the private action, that alleged that defendants had engaged in racial discrimination at Terminal's facilities nationwide. Private plaintiffs obtained a substantial portion of the relief they sought and then moved for their attorneys' fees award.

Defendants "argue[d] that no attorneys' fees should be awarded the Private Plaintiffs because, due to the [G]overnment's action (filed after and consolidated with the private action), there was no necessity for the private action." *Terminal Transport*, 653 F.2d at 1021. The Fifth Circuit

rejected this argument and remarked that it was irrelevant whether "necessity" existed for the private action. The court held that parallel governmental actions do not deprive a private party of its statutory right to attorneys' fees and noted that "if Congress had intended that Private Plaintiffs' attorneys' fees not be permitted when private and Government actions are consolidated, it would have specifically so provided." *Id.*

Moreover, in no way did the Fifth Circuit require that plaintiffs present direct evidence that their suit, and not the Government's, was the sole cause of the result that was obtained. Instead, the court awarded fees because the circumstances of the case showed that the actions of private plaintiffs' attorneys were warranted in law, necessary to protect the clients' interests, and vigorously maintained. *Id.* at 1020.

The decision of the Southern District of Alabama in *United States* v. *Marengo County Comm'n*, 667 F. Supp. 786, 789 (S.D. Ala. 1987), provides an application of the Fifth Circuit's correct standard and accurately reflects the purposes of fee-shifting statutes. In *Marengo County*, private plaintiffs challenged the at-large election of members to various city commissions as discriminatory. Over one week later, the Attorney General of the United States filed a similar action, and both the Government and private actions were thereafter consolidated. The consolidated action proceeded to a trial in which both the Government and private plaintiffs lost. The Government alone appealed, and the Eleventh Circuit ultimately reversed the district court's decision and remanded for further proceedings. The district court rendered a new decision favorable to both private plaintiffs and the Government.

As in the instant case, defendants in *Marengo County* admitted that litigation was successful in prompting the

relief sought. Also, as in Royal Crown's case, defendants asserted that the success was achieved solely through the efforts of the Government, thus characterizing only the Government as the prevailing party. The court disagreed, awarded attorneys' fees, and concluded that, to the extent that the Government led the litigation offensive against the election system (and solely prosecuted the appeal), duplicative efforts were avoided and attorneys' fees were saved. *Id.*

**B. The First Circuit**

The First Circuit, also in a Section 1988 case, has held that the mere existence of pendent suits by other plaintiffs is not an automatic basis for denying or diminishing a plaintiff's fee award. *Nadeau* v. *Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). In *Nadeau*, the district court had denied fees since plaintiff's role in prompting the desired relief was uncertain due to the presence of other related suits and the impossibility of delineating the impact of plaintiff's suit. *Id.* at 280.

The First Circuit held that the district court's failure to award attorneys' fees was error, and noted in remanding that a court should simply adjust the award to reflect each party's role, and not make an "all or nothing" determination. *Nadeau*, 581 F.2d at 281. Any other holding, the First Circuit concluded, would be contrary to the objective of the fee-shifting provision and a "powerful disincentive to legitimate actions, for the fact that there was more than one suit against officials of an institution would not merely bar the later attorneys from compensation but would jeopardize the fees of counsel in the original suit." *Id.* (citations omitted).

Moreover, the court remarked that uncertainty as to the role of the petitioning plaintiff's suit is not grounds

for denial of a fee award. A showing that the suit was a material factor, based upon chronology, and was meritorious, is sufficient. *Id.*

**C. The Third Circuit**

In the Third Circuit's view, to obtain prevailing party status, plaintiff need show only that its litigation had merit, was presented in good faith, and constituted a "catalyst" for defendants' voluntary behavior. *See NAACP* v. *Wilmington Medical Center, Inc.*, 689 F.2d 1161 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983); *Morrison* v. *Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). In *Wilmington Medical Center*, plaintiffs brought a class action under Title VI of the 1964 Civil Rights Act and Section 504 of the Rehabilitation Act, alleging that the relocation of defendant medical center resulted in discrimination based on race and physical handicap. The district court stayed plaintiffs' action and ordered the HEW to conduct a civil rights investigation. 689 F.2d at 1163. The HEW found that the relocation plan constituted *prima facie* violations of Title VI and Section 504.

Plaintiffs then moved for an attorney's fee award under Section 1988 and a similar provision of the Rehabilitation Act. In an opinion resembling that of the court of appeals in this case, the district court denied the award, holding that any benefits conferred were the independent result of the HEW and defendant medical center. *NAACP* v. *Wilmington Medical Center, Inc.*, 530 F. Supp. 1018, 1025 (D. Del. 1981). The Third Circuit reversed, finding that plaintiffs had prosecuted meritorious claims in good faith. *Wilmington Medical Center*, 689 F.2d at 1170. The Third Circuit observed that plaintiffs would have been entitled to attorneys' fees had defendant volun-

tarily acted after the filing of plaintiffs' lawsuit. The court then found that *the result should not differ because a Government agency was immediately responsible for defendant's development of a nondiscriminatory plan. Id.*

In light of the conflict between the court of appeals' restrictive imposition in Royal Crown's case of a higher legal standard on the one hand and the broad reading of this statute by the Fifth, First, and Third Circuits on the other, guidance from this Court is essential. Moreover, if the conflict remains, the incentive that fee-shifting statutes were intended to provide will be significantly diluted.

As the district court recognized and as is further discussed below, it is both illogical and inconsistent with the Congressional intent of Section 16 to require, as did the court of appeals in this case, a higher showing of causation simply because the defendants alleged that it was the Government in contrast to some non-litigation motivation that was the cause of their capitulation. Defendants' admissions that litigation, as opposed to some business-related or other motivation, prompted their capitulation, as well as the recognized merit of the case, the chronology of events and other circumstances observed by the district court, are sufficient to meet the prevailing party standard under Section 16. In light of Congressional policy encouraging parallel Government and private proceedings, the existence of a concurrent Government suit should not result in the imposition of a higher causation standard, especially since the defendants can never owe attorneys' fees to the Government. Accordingly, this Court should grant certiorari.

## II.

## The Court of Appeals Erroneously Required that a Petitioning Plaintiff Must Demonstrate that Its Action Was Necessary and Controlling Merely Because of the Existence of a Concurrent Government Action, Which Is Contrary to Law and Congressional Policy.

As discussed above, the correct causation standard by which to assess a request for attorneys' fees is the "substantial factor" or "catalyst" test. The court of appeals, however, required significantly more to demonstrate the causal link. The court held that plaintiff must show that its litigation, in comparison to that of the Government, was both necessary and the controlling relief. (App. A17-18.) Even in cases in which a plaintiff receives no relief on the merits because the defendants terminate their illegal conduct voluntarily, attorneys' fees are awarded. Accordingly, the dual requirement that a private plaintiff must have obtained relief, and that the relief was controlling, flies in the face of Congressional policy that favors, not discourages, complementary private and Government antitrust enforcement.

### A. A Plaintiff in a Dual Litigation Context Need Not Demonstrate that Its Lawsuit Afforded Either Necessary or Controlling Relief To Establish Entitlement to Attorneys' Fees.

In conflict with appropriate legal standards, the court of appeals specifically held that the usual "substantial factor" or "catalyst" standard was not applicable to the present case because the alternative motivation was a concurrently pending antitrust action—and, specifically, one pursued by the Government:

> Because of the FTC's involvement in the appellants' ultimate decision to abort their respective transac-

> tions, we cannot draw the usual inference of "cause and effect" from the chronology of events in the context of the role that the Royal Crown litigation played in the abandonment of the acquisition.

(App. A17-18.) From there, the Panel proceeded to reconstruct the record below to determine whether Royal Crown's action either was necessary or was the controlling relief. This standard is entirely inappropriate when defendants voluntarily capitulate before plaintiff receives, or indeed has an opportunity to obtain, dispositive adjudicatory relief. In abandonment cases, there is no requirement that plaintiff have obtained any relief whatsoever, and the courts have acknowledged that plaintiff must only demonstrate that it was a "substantial cause" and not an exclusive cause.

In *Leroy* v. *City of Houston*, 831 F.2d 576 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988), for example, defendant City argued that it changed its discriminatory voting districts in response to an unfavorable reaction by the Department of Justice. *Id.* at 580. The defendant implied that plaintiffs' suit was in fact unnecessary and completely unrelated to its voluntary abandonment of its illegal behavior. The court held plaintiffs needed only to demonstrate that their litigation was a "substantial factor" in motivating defendants to end their unconstitutional actions and did not need to show that their litigation was an "exclusive" cause or necessary or the controlling relief. *See id.* The court relied merely on the chronology of events, evaluated by the district court, in upholding the district court's award of attorneys' fees. *Id.; see also Martin* v. *Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985) (only question is whether plaintiff's lawsuit was a catalyst).

In *Morrison* v. *Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981), the Third Circuit similarly held that when there is more than one

cause, particularly in a dual motivation case in which defendants' abandonment of the illegal conduct was voluntary, petitioning plaintiff's suit need only be a material factor in prompting defendants' remedial behavior. The court refused to hold that because there was a competing causal motivation, the petitioning plaintiff's action was unnecessary. The court noted that plaintiff did not need to establish that its suit was a "sole" cause, but merely a "material factor" to demonstrate causation. *Id.* at 671. Therefore to require that a petitioning plaintiff meet this increased "necessary and controlling relief" standard is in conflict with the law of other circuits and particularly inappropriate when defendants voluntarily abandon their illegal behavior.

**B. Congressional Policy Mandates Concurrent Private and Government Antitrust Actions.**

The imposition of this new burden implies a bias in favor of Government action by raising the causation standard once the Government action exists. This is completely contrary to Congressional policy, which favors, and indeed encourages, parallel private and Government antitrust enforcement. In 1976, Congress amended Section 16 to allow attorneys' fees to encourage private plaintiffs, including "possible competitors," to maintain antitrust injunction actions by insuring that private parties would not have "to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect." *See* H.R. Rep. No. 499, Part 1, 94th Cong. 2d Sess. 19-21 (1975), *reprinted in* 1976 U.S. Code Cong. & Admin. News 2572, 2588-90. In its recent holding that private divestiture is a form of injunctive relief available under Section 16, this Court reiterated the vital importance of "vigorous private litigation" against anticompetitive behavior, even when the FTC has chosen not to challenge

the transaction in question. *California* v. *American Stores Company*, No. 89-258, slip op. at 7 (U.S. April 30, 1990); *see also Consolidated Gold Fields, PLC* v. *Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989); *R.C. Bigelow, Inc.* v. *Unilever N.A.*, 867 F.2d 102, 104 (2d Cir.), *cert. denied*, 110 S. Ct. 64 (1989); *Grumman Corp.* v. *LTV Corp.*, 665 F.2d 10 (2d Cir. 1981) (joint private and governmental effort prevented anti-competitive behavior).

By holding that the presence of a Government suit results in the application of a higher causation standard under which a private plaintiff must demonstrate that its suit was necessary and controlling, the court of appeals ignored the Congressional purpose of the Clayton Act, which encourages complementary private and governmental antitrust enforcement. *See* Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1988) (judgment rendered in a prior governmental action "shall be prima facie evidence against such defendant" in subsequent private litigation); Section 5(i) of the Clayton Act, 15 U.S.C. § 16(i) (1988) (suspension of running of statute of limitations of any private action where Government has instituted suit); *see also Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689-90 (1961) ("[J]ust as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation."); *United States* v. *Borden Co.*, 347 U.S. 514, 518-19 (1954) (Government and private actions often vindicate different interests and can usefully proceed side-by-side).

At least in the antitrust setting, private and Government actions were meant to proceed in a complementary manner. Since in the absence of the Government's suit plaintiff would have been a prevailing party, to hold differently merely because the Government's suit proceeded concur-

rently clearly penalizes the private party and creates a disincentive for it to bring suit. This holding is in conflict with precedent and the important policies underlying Section 16 of the Clayton Act.

## III.

### A Conflict Among the Circuits Exists As to Whether a Petitioning Plaintiff Must Present at an Evidentiary Hearing Direct Evidence of Subjective Motivation.

The court of appeals erred by requiring a private plaintiff seeking a fee award to differentiate its action from a concurrent Government action by evidence that would not have been required in a conventional abandonment case, and that is both ordinarily unavailable and inherently unreliable. Moreover, any attempt by a plaintiff to obtain such evidence would result in a second litigation of enormous magnitude, contrary to the clear and often-repeated teaching of *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

In reviewing the record on which the district court granted Royal Crown's fee award, the court of appeals complained that Royal Crown neither requested an evidentiary hearing nor submitted direct evidence that defendants' subjective motivation for capitulation was Royal Crown's litigation.

> Although it bore the burden of proof and persuasion of an entitlement to attorney's fees, Royal Crown did not request the district court to hold an evidentiary hearing . . . . Royal Crown did not attempt to depose, cross-examine or impeach any officers, directors or attorneys of the appellants on the issue of causation; it did not offer any documents or other

> material on the causation issue; and it did not respond to appellants' affidavits.

(App. A14.) The court of appeals suggested that Royal Crown:

> could have deposed members of the FTC and the FTC's attorneys to discover what impact, if any, the Royal Crown litigation had on the FTC's own action and litigation. Finally, Royal Crown could have cross-examined and impeached the directors of the appellant corporations who submitted affidavits stating that the sole reason for the failure of the acquisitions was the FTC's opposition to them.

(App. A15.) The court thus imposed a new evidentiary requirement for entitlement to attorneys' fees: direct evidence of subjective motivation, from either the defendants or the concurrent plaintiffs, that the petitioning plaintiff was responsible for defendants' abandonment of illegal conduct. Issues concerning causality are presented in virtually every case in which a court makes a fee award to a plaintiff that prevailed when defendants abandoned their illegal conduct. In such cases, defendants routinely point to factors other than plaintiff's litigation as the motivation for their corrected behavior. Courts, recognizing that defendants will advance these self-serving statements of motivation, decide causality on the basis of objective evidence like the chronology of events and such circumstances as the merit of the case.

Other courts of appeals have held unqualifiedly that direct evidence of subjective motivation—such as a party or nonparty admission—is not necessary to prove entitlement to a fee award. *See Harrington* v. *DeVito*, 656 F.2d 264, 267 (7th Cir. 1981) (plaintiff may rely on chronology of events and other circumstantial evidence when defendant argues that its response was wholly gratuitous), *cert. denied*,

455 U.S. 993 (1982); *United Handicapped Federation* v. *Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (same); *Nadeau* v. *Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978) (to merit an attorney's fee, plaintiff may rely on circumstantial evidence for inference that plaintiff motivated defendant to abandon its unlawful behavior).

Indeed, the First Circuit has specifically rejected the submission of admissions as a condition of receiving a fee award, and has relied upon traditional forms of circumstantial evidence such as the chronology of events. *Nadeau*, 581 F.2d at 281 ("evidence relevant to the causes of defendant's behavior is under defendant's control and not easily available to plaintiff"). The Third Circuit similarly has refused to impose a causation standard that hinges on direct evidence of a defendant's motivation. *Morrison* v. *Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). The court stated that "[t]o require some stricter standard of causation would mean that the defendant could hide his true motivation behind what seems a plausible alternate justification." *Id.* Finally, this new requirement undermines this Court's complementary teaching that assessment of parties' mental states is inappropriate in fee award proceedings. *See Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 109 S. Ct. 1486, 1493 (1989) (investigations into parties' subjective motivations in fee award cases described as "excruciating" and contrary to purposes of fee-shifting statutes).

Also contrary to the court of appeals' opinion, other circuits have uniformly held that an evidentiary proceeding is not required to prove entitlement to a fee award.[4] *See*

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[4] The Court of Appeals, relying upon *Iranian Students Ass'n* v. *Sawyer*, 639 F.2d 1160, 1163 (5th Cir. Unit A 1981) and *Fields* v. *City of Tarpon Springs*, 721 F.2d 318, 321 (11th Cir. 1983), sug-

*(footnote continued on following page)*

*Union of Concerned Scientists* v. *U.S. Nuclear Regulatory Comm'n*, 840 F.2d 957, 959 (D.C. Cir. 1988) (court refused to force plaintiff, through evidentiary hearing, to quantify impact on relief it obtained); *Norman* v. *Housing Authority*, 836 F.2d 1292, 1303 (11th Cir. 1988) (district court may make a fee award based on affidavits without an evidentiary hearing); *Martinez* v. *Schock Transfer & Warehouse Co.*, 789 F.2d 848, 849 (10th Cir. 1986) (upholding denial of discovery in fee award case).

Most important, the court's evidentiary requirements run directly counter to this Court's emphatic teaching that "requests for attorneys' fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437; *see McDonald* v. *Secretary of Health & Human Services*, 884 F.2d 1486, 1474 (1st Cir. 1989) (citing *Hensley*); *Wagenmann* v. *Adams*, 829 F.2d 196, 226 (1st Cir. 1987) (noting that it would not allow fee awards to result in "second major litigation," quoting *Hensley*); *Commonwealth of Puerto Rico* v. *Heckler*, 745 F.2d 709, 714 (D.C. Cir. 1984) (reprimanding district court for allowing protracted litigation on fee award).

Under the court of appeals' prescription, Royal Crown should have served comprehensive document requests on each of the defendants, seeking some indication of Royal Crown's role in defendants' legal and business strategies. Royal Crown should also have deposed defendants' "officers, directors and attorneys" and "members of the FTC and

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*(footnote continued from preceding page)*

gested that the proper method by which to obtain a fee award was to request an evidentiary hearing. (App. A15.) Both of these case were prior to this Court's holding in *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). Moreover, neither of these cases held that a hearing was a prerequisite to a fee award, but that if requested, a hearing should be allowed. *Iranian Students*, 639 F.2d at 1163; *Fields*, 721 F.2d at 320-21.

the FTC's attorneys," presumably referring to the FTC Commissioners and the staff attorneys who assessed the Acquisitions.[5] (App. A15.)

This prescription calls for boxes of documents and weeks of depositions, all directed to the futile exercise of obtaining largely privileged and entirely subjective after-the-fact evidence that defendants' capitulation resulted from Royal Crown's action and not from that of the FTC. Such discovery produces exactly the kind of second major litigation prohibited by this Court.

## IV.

### The Court of Appeals' Failure To Remand Is Contrary to Established Precedent and Its Application of the "Clearly Erroneous" Standard Is Contrary to the Rule of *Anderson* v. *City of Bessemer City.*

Having imposed upon Royal Crown these erroneous burdens, the court proceeded to assess the evidence in the record below. As this and several other courts have recog-

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[5] This is expressly contrary to established law protecting the Government's deliberative process. In *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975), this Court recognized that Exemption 5 of the Freedom of Information Act, prohibiting the discovery of certain agency documents, rests upon the policy of protecting the decision-making process of Government agencies. Based upon that principle, this Court specifically held that advice and appeals memoranda, which explained decisions by the General Counsel of the National Labor Relations Board to file complaints and commence litigation, were not final opinions and fell within the scope of Exemption 5. *Id.*; *see also Leroy* v. *City of Houston*, 831 F.2d 576, 581 (5th Cir. 1987) (seeking information from the Department of Justice to prove whether plaintiff's litigation motivated the Department to take a course of action is inconsistent with confidentiality and efficiency of administrative process), *cert. denied*, 486 U.S. 1008 (1988).

nized, when new legal standards are created by the court of appeals, the proper action is for the court to remand to the district court to hold a hearing to satisfy the new legal and evidentiary standards. *See Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971); *Carver* v. *Knox County*, 887 F.2d 1287, 1294 (6th Cir. 1989); *Concrete Machinery Co.* v. *Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612 (1st Cir. 1988); *Aguon* v. *Calvo*, 829 F.2d 845, 848 (9th Cir. 1987); *Youngstown Sheet & Tube Co.* v. *Lucey Products Co.*, 403 F.2d 135, 139 (5th Cir. 1968). This the court failed to do. It instead reconstructed the record to determine whether Royal Crown had satisfied the new standards. This Court should not allow an appellate court to assume a fact-finding role when the appropriate remedy is remand.

Moreover, the court of appeals' appropriate review under Fed. R. Civ. P. 52(a) was limited to whether the lower court's decision was clearly erroneous. In *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985), this Court held that, under Fed. R. Civ. P. 52(a), a factual finding must be affirmed if it is "plausible in light of the record viewed in its entirety," or if the appellate court lacks "the definite and firm conviction that a mistake has been committed." *Id.* at 573 (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Specifically, "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574 (citations omitted).

Further, "[t]his standard does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced it would have decided the case differently." *Anderson*, 470 U.S. at 573. This is particularly true when the district court has made credibility determinations, regardless of whether the district court

reached its conclusions based on documentary evidence or evidence from other facts. *Id.* at 574.

Contrary to the teaching of *Anderson*, the court weighed the evidence *de novo*. Both the court of appeals and the district court made their determinations on the basis of the same chronology of events. (App. A33-36; App. A17-18.) The court of appeals did not identify any evidence that either was overlooked by the district court or inconsistent with the district court's conclusions. *Cf. Anderson*, 470 U.S. at 575 (when documents, other objective evidence or internal inconsistencies contradict the evidence relied upon, court of appeals may find clear error).

Rather, the court of appeals simply drew different inferences from the same set of facts that the district court relied upon, pursuant to its new causation and evidentiary standards. The court conceded that:

> [i]f we look only at the timing of events as they relate to Royal Crown's litigation and the action of the appellants, we might infer that the litigation caused the transactions to fail. After all, Royal Crown filed a complaint and obtained a TRO, extended the TRO, conducted discovery and was preparing for trial when the appellants suddenly abandoned the acquisitions.

(App. A17.) The court rejected this view of the evidence, however, and accepted the contrary inference that "[i]n this case . . . there is ample evidence to conclude Royal Crown's suit was not necessary to stop the proposed merger." (App. A28 n.5.) By so finding, the court of appeals assumed the role of the lower court, and blatantly overstepped the bounds of its limited role under Rule 52(a) of the Federal Rules of Civil Procedure. *See Anderson*, 470 U.S. at 575 (Fourth Circuit could not find clear error

when district court and the Fourth Circuit drew opposite inferences in interpreting the same record).

Moreover, the court's application of the clearly erroneous standard is exactly contrary to that of other Circuits in attorneys' fees cases. *See, e.g., Heath* v. *Brown*, 858 F.2d 1092, 1094 (5th Cir. 1988) (no clear error even when testimonial evidence was contrary to district court's findings, especially because defendants are unlikely to reveal true motivations); *Sablan* v. *Dep't of Finance of the N. Mariana Islands*, 856 F.2d 1317, 1326 (9th Cir. 1988) (court loathe to second-guess probative value accorded chronology of events since it is difficult to glean defendant's motivations for mending its ways; district court's conclusion, based on inference from chronology, not clearly erroneous).

In light of the court of appeals' action, this Court should grant certiorari in order to reestablish the importance of compliance with Fed. R. Civ. P. 52(a) and the *Anderson* rule to the proper functioning of the federal court system.

## Conclusion

For the foregoing reasons, Royal Crown respectfully requests that this Court grant the within Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: May 10, 1990

# APPENDIX

**Opinion of the Court of Appeals**

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

ROYAL CROWN COLA CO.,

*Plaintiff-Appellee,*
*Cross-Appellant,*

v.

THE COCA-COLA COMPANY,
PEPSICO, INC., and DR. PEPPER CO.,

*Defendants-Appellants,*
*Cross-Appellees.*

No. 88-8014
Nov. 13, 1989

Soft-drink company brought Clayton Act action against other soft-drink companies to prevent them from acquiring carbonated soft-drink companies. The United States District Court for the Middle District of Georgia, No. 86-107-COL, J. Robert Elliott, J., 678 F.Supp. 875, entered award of attorney fees in favor of plaintiff. Appeal was taken. The Court of Appeals, Clark, Circuit Judge, held that plaintiff was not a "prevailing party" entitled to recover attorney fees.

Reversed.

Richard T. Coleman, Howrey & Simon, Washington, D.C., Jerrold J. Ganzfried, Richard A. Marchetti, Page, Scrantom, Harris & Chapman, Columbus, Ga., for defendants-appellants, cross-appellees.

Trammell E. Vickery, Hansel & Post, Atlanta, Ga., Jonathan Band, Wm. F. Squadron, Washington, D.C., for D. Pepper.

Albert W. Stubbs, Hatcher, Stubbs, Land, Hollis & Rothschild, Columbus, Ga., David Lee Foster, Willkie Farr & Gallagher, New York City, James H. Wallace, Jr., Wiley, Rein & Fielding, Washington, D.C., for plaintiff-appellee, cross-appellant.

Gordon B. Spivak, Coudert Brothers, New York City, Frank C. Jones, King & Spalding, Atlanta, Ga., for COCA-COLA CO.

Appeals from the United States District Court for the Middle District of Georgia.

Before

JOHNSON and CLARK, Circuit Judges, and
ZLOCH*, District Judge.

CLARK, Circuit Judge:

In this appeal, the appellants challenge the propriety of an award of almost 1.4 million dollars in attorney's fees in favor of the Royal Crown Company (Royal Crown) for its efforts to prevent PepsiCo Inc. (PepsiCo) and the Coca-

* Honorable William J. Zloch, U.S. District Judge, for the Southern District of Florida, sitting by designation.

Cola Company (Coca-Cola) from acquiring certain carbonated soft drink companies. 678 F.Supp. 875. Because we find that Royal Crown is not a "prevailing party" within the meaning of the Clayton Act, 15 U.S.C. § 26, we reverse.

## I. BACKGROUND

In the year 1986, two carbonated soft drink company giants each attempted mergers with other well known carbonated soft drink companies. These mergers were ultimately aborted. Today, we attempt to resolve the remaining repercussions of actions taken during that year.

On January 24, 1986, PepsiCo announced its plans to acquire the Seven-Up Company (Seven-Up) through Seven-Up's parent company, Philip Morris, Inc. Shortly thereafter, Coca-Cola announced on February 25, 1986, that it planned to acquire the Dr. Pepper Company (Dr. Pepper) through Dr. Pepper's sole stockholder, DP Holdings, Inc. The parties to these merger agreements fied their respective notification and report forms with the FTC and with the Department of Justice as required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (Hart-Scott-Rodino Act). At the same time, Royal Crown retained legal counsel in order to mount a challenge to these acquisitions.

The Hart-Scott-Rodino Act establishes a 30-day waiting period following the submission of certain forms during which time any applicable acquisition cannot be consummated. 15 U.S.C. § 18a(b)(1). In the present case, the FTC requested additional information from the parties thereby extending the waiting period for 20 days following the parties' response to the request. 15 U.S.C. § 18a(e)(2). In early June, it was apparent that the FTC's investigation

of PepsiCo's acquisition of Seven-Up and Coca-Cola's acquisition of Dr. Pepper was not proceeding at optimal speed. Upon this realization and at the FTC's request, the involved parties agreed not to complete the proposed acquisitions prior to 11:59 p.m. on June 24, 1986. The FTC later scheduled a closed meeting for June 20, 1986 to consider both proposed acquisitions.

On June 19, 1986, Royal Crown filed a complaint together with a motion for a temporary restraining order, (TRO), in the Middle District of Georgia. In its motion for a TRO, Royal Crown asked the district court to enjoin the proposed acquisitions pending a hearing on the merits of Royal Crown's complaint. On June 20, 1986, the same day that the FTC was scheduled to vote on whether to challenge the acquisitions and four days before the extended waiting period was to expire, the district court for the Middle District of Georgia held a hearing on Royal Crown's application for a TRO. Following argument by all of the parties, the district court granted the TRO and, at the request of Seven-Up, the court scheduled a hearing for June 30, 1986 in order to determine whether to issue a preliminary injunction. The district court also ordered expedited discovery. Later that same afternoon, the FTC voted to challenge both the PepsiCo and the Coco-Cola transactions.

On June 23, 1986, the FTC filed a motion in the district court for the District of Columbia to enjoin Coca-Cola from consummating the acquisition of Dr. Pepper. The FTC did not challenge the Seven-Up acquisition because, on that same day, PepsiCo and Philip Morris abandoned their efforts to complete their transaction. On June 24, the FTC and Coca-Cola appeared before the D.C. district court and, rather than present arguments for and against the implementation of a TRO, the parties represented to the court

that Coca-Cola would not consummate the acquisition until the D.C. district court ruled on the FTC's application for a preliminary injunction.

The next day, June 25, 1986, the remaining parties to the Georgia litigation, Royal Crown, Coca-Cola and Dr. Pepper, met in the Georgia district court to discuss a problem with the scheduled date of the preliminary injunction hearing to take place in that court on the 30th of June. Coca-Cola and Dr. Pepper requested the district court to postpone the hearing in order to allow the FTC action to proceed to hearing in the District of Columbia in mid-July. Although the Georgia district court vacated the June 30th hearing and stayed discovery until July 28, 1986, it ordered, without a hearing on the merits, that the existing TRO be continued as a preliminary injunction against Coca-Cola and Dr. Pepper and that a trial on the merits be accelerated to August 25, 1986.

On July 16, 1986, the D.C. district court held a hearing on the FTC's application for a preliminary injunction and on July 31, 1986, the injunction was granted until such time as the FTC completed its administrative proceeding with respect to the Dr. Pepper acquisition. Coca-Cola challenged this decision by requesting an expedited appeal which the FTC opposed. The Coca-Cola/Dr. Pepper agreement of February 1986 provided that if, for any reason, the transaction did not close by August 29, 1986, either party could terminate the agreement. On August 5, 1986, five days after the D.C. district court issued a preliminary injunction in favor of the FTC, Coca-Cola and Dr. Pepper announced that they too had abandoned their proposed acquisition.

Royal Crown subsequently filed a motion requesting an award of attorney's fees. At the request of some of the

defendants, the district court heard oral argument on Royal Crown's motion, but did not hold an evidentiary hearing. On August 25, 1986, a stipulation and order was entered in the Georgia district court vacating the preliminary injunction and dismissing the complaint but reserving to any party the right to seek attorney's fees.

In a memorandum dated January 16, 1987, the district court found that Royal Crown was entitled to a fee award pursuant to section 16 of the Clayton Act. In determining that Royal Crown's action was a "substantial factor" and a "catalyst" in causing the abandonment of the proposed acquisition, the district court set out the following:

> The Court has given consideration to the briefs submitted and oral arguments made by counsel and has concluded that in this case the situation which existed before Royal Crown filed suit, the situation as it now exists, and the intervening course of events clearly show that Royal Crown was both a "substantial factor" and a "catalyst" in motivating the Defendants to terminate their planned acquisitions. Royal Crown filed this action on June 19, 1986. Prior to that time both the Coca-Cola acquisition of Dr. Pepper and the Pepsico acquisition of Seven-Up were to be consummated at the end of the Hart-Scott-Rodino waiting period which is required for all large mergers. In conjunction with its complaint, Royal Crown, at the same time, filed a motion for a temporary restraining order and at that time no action had been taken by any government agency to challenge these transactions, and prospects for any such action were uncertain. The Court conducted a hearing on June 20 and issued the requested temporary restraining order that prevented

immediate consummation of the proposed acquisitions after the waiting period, and at the same time, at the request of counsel for Philip Morris and Seven-Up, set a hearing on the application for preliminary injunction to begin just ten days later on June 30. Later the same day (June 20), after this Court had issued the temporary restraining order, the Federal Trade Commission (FTC) decided that it would institute its own proceeding to challenge the acquisitions.

After obtaining the temporary restraining order Royal Crown immediately launched full-scale discovery to prepare for the preliminary injunction hearing, dispatching teams of lawyers to a number of locations to review the Defendants' documents and simultaneously scheduled and commenced depositions of the Defendants' key officials and experts. After some of the depositions had already begun, Philip Morris, Seven-Up, and Pepsico announced on June 23 that their proposed transaction had been cancelled. In light of this development the temporary restraining order which had been entered by this Court on June 20, insofar as it applied to those Defendants, was vacated on June 26 and therefore did not continue in effect as a preliminary injunction against them. After the announcement on June 23 above mentioned the Royal Crown lawyers who had been assigned to review the documents of Pepsico, Philip Morris, and Seven-Up were redeployed to continue Royal Crown's discovery efforts against Coca-Cola and Dr. Pepper.

Because this Court had already issued a temporary restraining order it was not necessary for

the FTC to seek immediate judicial relief. Rather, the FTC acceded to Coca-Cola's request that a preliminary injunction hearing be scheduled in the United States District Court for the District of Columbia in the middle of July. After having obtained a tentative hearing date of mid-July in that court, Coca-Cola then represented to this Court that there was an unavoidable scheduling conflict and asked this Court to postpone the preliminary injunction hearing in this case, which, as above noted, had already been set for June 30. In an effort to accommodate Coca-Cola's difficulties, this Court agreed to adjourn the June 30 preliminary injunction hearing under the following conditions: (1) this Court's original restraining order which would "continue in effect as a preliminary injunction" until a plenary hearing on the merits; (2) a one week trial on the merits would be held in Columbus beginning August 25; and (3) expedited discovery would be suspended temporarily to resume again as of Monday, July 28. This Court made it clear that the revision of schedule of events in this court as above indicated was solely for the purpose of accommodating counsel for Coca-Cola and Dr. Pepper and that the proceedings in this action in this court would not otherwise be governed or affected by the proceedings in the District of Columbia court or by the determinations which might be ultimately made by that court.

The parallel FTC action in the District of Columbia proceeded to a preliminary injunction hearing on July 16-18. Full-scale discovery in the action pending in this court recommenced on July 28 look-

ing toward the August 25 trial on the merits. That full-scale discovery continued even after the District of Columbia court on July 31 reached the stage that this Court had previously reached by issuing an order granting the FTC's motion for preliminary relief. Finally, following several more days of discovery activity by Royal Crown and in the course of Royal Crown's deposition of one of the Coca-Cola economic experts, Coca-Cola and Dr. Pepper announced on August 5 that the proposed acquisition had been abandoned.

Royal Crown does not contend, and this Court does not conclude, that the action then pending in this court was the sole cause for the Defendant's [sic] abandonment of the challenged acquisition. Undoubtedly the parallel FTC proceeding in the District of Columbia also played a role in the abandonment, but the Court regards the contention of the Defendants that the pendency of this private antitrust action in this court was of no concern to the Defendants and was not a motivating factor in their decision to abandon the merger [sic] to be unrealistic and incredible.[1] After all, it was Royal Crown who obtained the first judicial relief and indeed the controlling relief throughout the legal challenge to the proposed transactions, and the mere existence of another suit later instituted which sought the same injunctive relief does not warrant denying or diminishing Royal Crown's right to an award of attorney's fees. In *Grumman Corp. v.*

[1] If Dionysus had suspended two swords over the head of Damocles is it likely that Damocles would have been concerned about one but not the other?

> *LTV Corp., supra,* it was held that a subsequent FTC decision to challenge a merger did not defeat the right of the plaintiff in a private antitrust suit to an attorney's fee under Section 16 of the Clayton Act. The Coca-Cola-Dr. Pepper transaction could not be completed until this Court ruled on its merits regardless of any decision made by the District of Columbia court as a result of the July preliminary injunction.
>
> In summary, the proposed acquisitions were moving forward toward imminent consummation before Royal Crown filed its action in this court and now they are terminated, and this is precisely the relief which Royal Crown sought. The Court determines as a matter of fact that the injunctive relief obtained by Royal Crown in this action as well as Royal Crown's vigorous prosecution and discovery efforts constituted a substantial factor and a catalyst in motivating the Defendants to terminate their acquisitions, and concludes as a matter of law that in this factual setting Section 16 of the Clayton Act thus entitles Royal Crown to an award of attorney's fees and expenses, and the Court will make such an award.

(D.Ct. Order, January 16, 1986 at 3-7) (footnote 2 omitted).

The district court ultimately entered judgments in favor of Royal Crown and against Coca-Cola and Dr. Pepper each in the amount of $394,862 and against PepsiCo in the amount of $284,825. No judgment was entered against Seven-Up and Philip Morris because they had entered into a settlement agreement with Royal Crown and were no longer parties to the proceedings. Specifically, the district

court awarded Royal Crown attorney's fees for (1) preparing for and prosecuting the district court action, (2) lobbying the FTC to adopt Royal Crown's position on the acquisitions, and (3) filing an *amicus curiae* brief on behalf of Royal Crown in the Supreme Court case of *Cargill, Inc. v. Monfort of Colorado, Ins.*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). The district court denied Royal Crown's request for the reimbursement of expert witness fees and certain other costs and reduced the total award by five pecent for duplication of effort among the three firms representing Royal Crown. This appeal ensued.

## II. DISCUSSION

We subject the district court's factual finding that Royal Crown's litigation "catalyzed" the appellants' abandonment to the "clearly erroneous" standard of review. *Cf. Hewitt v. Helms*, 482 U.S. 755, 768, 107 S.Ct. 2672, 2680, 96 L.Ed.2d 654 (1987) (Marshall, J. dissenting) (question of whether litigation was "catalyst" in causing defendant's actions is an issue of fact). The amount of the attorney's fees award, however, is scrutinized for an abuse of discretion. *Fields v. City of Tarpon Springs*, 721 F.2d 318, 322 (11th Cir.1983). The appellants raise essentially four issues on appeal. First, they claim that the district court was clearly erroneous in finding that the Georgia litigation was a "substantial factor" and a "catalyst" resulting in the abandonment of the acquisitions in question. Second, the appellants argue that the district court erred as a matter of law in beginning its attorney's fee analysis without a loadstar figure. Third, citing specific points of error as to certain items, they argue that the district court abused its discretion in awarding Royal Crown an attorney's fee of almost 1.4 million dollars. Finally, Dr. Pepper argues that

the district court erred in assigning equal proportions of the award against Dr. Pepper and Coca-Cola when Dr. Pepper was the target company of the acquisition and could not be liable for the underlying Clayton Act violation. Royal Crown counters with an argument that the district court erroneously denied certain legitimate costs and fees. Because we find that Royal Crown's litigation was not a substantial factor or a catalyst in motivating the defendants to abandon their transactions, we address only that issue.[2]

Section 16 of the Clayton Act, codified in 15 U.S.C. § 26, provides that "in any action under this section in which the plaintiff substantially prevails, the court shall award the cost of the suit, including a reasonable attorney's fee, to such plaintiff." Thus, the preliminary inquiry is whether Royal Crown "substantially prevailed" within the meaning of the statute so that an attorney's fee award is appropriate.

Although this Circuit has not yet addressed the award of attorney's fees under section 16 of the Clayton Act for actions brought to challenge a proposed acquisition, we note that other courts apply the same test of "prevailing party" in this area as is used under section 1988 of the Civil Rights Attorney's Fees Awards Act. *See, e.g., Southwest Marine Inc. v. Campbell Industries,* 732 F.2d 744, 746 (9th Cir,),*cert. denied,* 469 U.S. 1072, 105 S.Ct. 564, 83 L.Ed.2d 505 (1984); *F & M Schaefer Corp. v. C. Schmidt & Sons, Inc.,* 476 F.Supp. 203, 205-06 (S.D.N.Y. 1979);*Grumman Corp. v. LTV Corp.,* 533 F.Supp. 1385,

[2] Royal Crown cross appeals, arguing that the district court erred in reducing their claim by $285,000. Royal Crown maintains that the disallowed expenses were legitimate costs recoverable under section 26. Since we find that Royal Crown is not entitled to attorney's fees, the district court's disallowance of certain expenses as costs is irrelevant.

1387-88 (E.D.N.Y.1982). Before turning to this standard, we wish to make clear that Royal Crown bears the burden of establishing its entitlement to an award. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983).

In order to be a "prevailing party" under section 1988 and, by analogy, under the Clayton Act, "a plaintiff must receive at least some relief on the merits of the claim." *Hewitt*, 107 S.Ct. at 2675; *see also Texas State Teachers Association v. Garland Independent School District*,— U.S. —, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). In this case, Royal Crown did not receive any relief on the merits of its claim. The district court ordered a TRO to preserve the *status quo* until a hearing on the merits could be conducted. Later, the TRO was "extended" to a preliminary injunction because of a scheduling problem. No hearing on the merits ever took place and no substantive issues were ever adjudicated. Under these circumstances, the TRO/preliminary injunction entered in favor of Royal Crown does not, by itself, entitle Royal Crown to attorney's fees. *See Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir.1987).

Nonetheless, even in the absence of judicial relief, a plaintiff may still be a prevailing party if the plaintiff can show that his or her lawsuit was a causal link prompting some remedial action. *Fields*, 721 F.2d at 321. Such a causal connection or link is established by evidence that the lawsuit was a substantial factor or a significant catalyst in motivating the defendants to end their unlawful behavior. *Posada v. Lamb County*, 716 F.2d 1066, 1072 (5th Cir. 1983). *See also Taylor*, 810 F.2d 1551, 1560.

Thus, although Royal Crown did not receive any judicial relief on the merits of its claims, it may still be a "prevailing

party" if it establishes that its litigation was a substantial factor in causing the abandonment of the acquisitions. In order to meet its burden of proof on this issue, Royal Crown must do more than allege that its lawsuit prompted the appellants' actions. "The threat of litigation or even litigation itself is insufficient to establish a causal relationship. . . ." *Braafladt v. Board of Governors*, 778 F.2d 1442, 1444 (9th Cir. 1985). Rather, Royal Crown must put forth some evidence establishing that its litigation actually played a substantial role in the appellants' decision to abandon the acquisitions. Under this burden of proof, the fact that the FTC also challenged the appellants' transactions is not fatal to Royal Crown's position because Royal Crown need not establish that its litigation was the sole cause of the appellant's ultimate actions. Instead, Royal Crown must only prove that its litigation was itself a substantial cause in bringing about the appellants' decisions to abort the challenged transactions. *Posada*, 716 F.2d at 1072.

Although it bore the burden of proof and persuasion of an entitlement to attorney's fees, Royal Crown did not request the district court to hold an evidentiary hearing with respect to the attorney's fees issue. Indeed, the district court held oral argument on the causation issue only at the request of some of the appellants. Royal Crown did not attempt to depose, cross-examine or impeach any officers, directors or attorneys of the appellants on the issue of causation; it did not offer any documents or other material on the causation issue; and it did not respond to the appellants' affidavits. Instead, Royal Crown relies solely on the chronology of events and the appellants' alleged "vigorous opposition" to the motion for a TRO, to meet its "causality burden." While such reliance may be both sufficient and

justified in some cases, in a case such as this one in which the plaintiff never received relief on the merits and in which other events completely obscure any inference to be drawn from the chronology of events, we believe something more is needed.

We note that in *Fields*, 721 F.2d at 320, 321, the district court held an extensive evidentiary hearing that resulted in a record that included expert testimony, charts, transcripts and correspondence. We also note that in *Iranian Students Association v. Sawyer*, 639 F.2d 1160 (5th Cir. Unit A, 1981), the Fifth Circuit found that the district court's refusal to hold an evidentiary hearing, despite the appellants' formal request, was clearly erroneous. "[T]he record must reflect ample evidence of a link between the litigation and the appel[lants'] action before the district court can award attorney's fees." *Id.* at 1163. Ample evidence potentially existed in this case on the issue of causation. For instance, Royal Crown could have questioned the directors of the appellant companies as to whether the agreement between the appellants and the FTC not to close before midnight June 24th, 1986, was conditional on the FTC's vote such that a vote not to oppose the mergers would have allowed the appellants to close their respective transactions immediately. In addition, Royal Crown could have deposed members of the FTC and the FTC's attorneys to discover what impact, if any, the Royal Crown litigation had on the FTC's own actions and litigation. Finally, Royal Crown could have cross-examined and impeached the directors of the appellant corporations who submitted affidavits stating that the sole reason for the failure of the acquisitions was the FTC's opposition to them.

Because Royal Crown did not follow the prescribed course of action laid out by the above-mentioned cases in

that it failed to request an evidentiary hearing, we presume that Royal Crown could not uncover any helpful facts to support its position. In the absence of Royal Crown submitting any evidence on the "causation" or "catalyst" issue, we must look to the totality of the circumstances to determine whether there is a causal connection between the Royal Crown litigation and the result achieved. In particular, we focus on the nature of the relief, the chronology of events and the role of the litigation of the movant seeking attorney's fees. *Braafladt,* 778 F.2d at 1444; *Fields,* 721 F.2d at 321.

## A. THE RELIEF

Looking first at the nature of the relief, we must determine whether Royal Crown's ends were accomplished and whether the appellants' remedial action was required by law. *Posada,* 716 F.2d at 1071-72. There is no dispute that the resolution of this action provided Royal Crown with the relief that it sought when it originally filed suit. Through litigation, Royal Crown was hopping permanently to enjoin the appellants from consummating the acquisitions. The defendants' abandonment of the transactions was exactly what Royal Crown desired.

Furthermore, the FTC's vote to oppose the mergers supports an inference that Royal Crown had a "deserving case" on the merits. *Cf. Grumman,* 533 F.Supp. at 1389 (plaintiffs entitled to attorney's fees where it brought "deserving" antitrust case). Additionally, in its original complaint and application for a TRO, Royal Crown submitted extensive memorandum, affidavits and exhibits that support a finding that the appellants' proposed acquisitions would have had anticompetitive effects on the soft drink industry in violation of the antitrust laws. (*See* R1-3-Ex.;

R1-1-Exs). While the evidence is certainly inconclusive, we believe that as long as it otherwise establishes that it substantially prevailed, Royal Crown has shown that its lawsuit furthered " 'the important national policies the antitrust laws reflect.' " *Grumman*, 533 F.Supp. at 1389 (quoting 1976 U.S.Code Cong. & Admin.News 2572, 2589).

## B. THE CHRONOLOGY OF EVENTS

We next turn to the chronology of events. While the chronology of events is important, it is not definitive because the question of causation is intensely factual. *Posada*, 716 F.2d at 1072; *Iranian Students Association*, 639 F.2d at 1163. If we look only at the timing of events as they relate to Royal Crown's litigation and the actions of the appellants, we might infer that the litigation caused the transactions to fail. After all, Royal Crown filed a complaint and obtained a TRO, extended the TRO, conducted discovery and was preparing for trial when the appellants suddenly abandoned the acquisitions. This depiction, however, is too simplistic and we decline to adopt such a *post hoc ergo propter hoc* analysis. "While the temporal relation between [a lawsuit and the relief sought] may be taken into account in determining . . . a causal nexus, timing, in itself . . . does not establish causation as a matter of law." *Public Law Education Institute v. Department of Justice*, 744 F.2d 181, 184 n. 5 (D.C.Cir.1984). Rather, a court must include all of the surrounding circumstances in its causation determination. *Braafladt*, 778 F.2d at 1444. Because of the FTC's involvement in the appellants' ultimate decision to abort their respective transactions, we cannot draw the usual inference of "cause and effect" from the chronology of events alone. Rather, we must evaluate the chronology

of events in the context of the role that the Royal Crown litigation played in the abandonment of the acquisition. It is this evaluation that leads us to conclude that the district court erred in awarding attorney's fees to Royal Cown.

## C. THE ROLE OF THE LITIGATION

The district court made several factual "findings" to support its conclusion that Royal Crown's litigation was a substantial cause of the termination of Coca-Cola's and PepsiCo's acquisitions. Specifically, the district court found that the injunctive relief was "the first judicial relief and indeed the controlling relief throughout the legal challenge to the proposed transactions," and that this injunctive relief, along with "Royal Crown's vigorous prosecution and discovery efforts, constituted a substantial factor and a catalyst in motivating the defendants to terminate their acquisitions." This latter finding is without any record evidence to support it. The district court further found that "the Coca-Cola-Dr. Pepper transaction could not have been completed until [the court] ruled on its merits regardless of any decision made by the District of Columbia court as a result of the July preliminary injunction." (District court op. dated Jan. 16, 1987 at 6-7).

We hold that the totality of the circumstances surrounding the proposed acquisitions does not support the district court's findings regarding the role of the Royal Crown litigation in the falure of the acquisitions. In turn, the district court's inaccurate findings cannot support the conclusion that Royal Crown's lawsuit was a substantial factor in the abandonment of the transactions. The district court's holding, therefore, is clearly erroneous.

1. The Litigation was not the Controlling Relief.

First, the district court erred in finding that the Royal Crown litigation constituted the "controlling relief" against the consummation of the acquisitions. While it is true that the TRO in Georgia was the first judicial relief, it cannot be said to have been the controlling relief. The TRO, granted on June 20, came into effect after the FTC waiting period had been voluntarily extended until June 24. Once the FTC voted, on June 20, to block the mergers, it was clear that the extended waiting period would remain in effect and that the parties would not be able to close prematurely. Thus, the TRO did not forbid the parties from doing anything that they could have otherwise done.

One day before the termination of the stipulated waiting period, PepsiCo abandoned its proposal. Furthermore, on the day that the extended waiting period was to expire, Coca-Cola and the FTC entered into an agreement, approved by the D.C. district court, whereby Coca-Cola agreed not to proceed with its acquisition until a hearing was held on the merits in the D.C. court.[3] Finally, on July 31, after a three day hearing, the FTC obtained a preliminary injunction.

From the foregoing chronology of events it is evident that even without any TRO or injunction from the Georgia district court, neither PepsiCo or Coca-Cola could have

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[3] One might question whether Coca-Cola would ever have stipulated to such an agreement if it were not for the TRO in Georgia. While such a hypothetical is impossible to answer, we do note that the FTC has a reduced burden to meet in order to acquire a TRO and that it is by no means novel for a party to enter into an agreement with the FTC not to close before a hearing is conducted. *See, e.g., FTC v. Owens-Illinois Inc.*, 681 F.Supp. 27 n. 1 (D.D.C.1988). Thus, without more, it would be speculation to say that the Georgia Court's TRO precipitated this action on the part of Coca-Cola.

gone forward with their respective acquisitions from the filing of Royal Crown's complaint on June 19 to its dismissal as to Pepsico and Seven-Up on June 26 and as to Coca-Cola and Dr. Pepper on August 25. The FTC first prevented the parties from going forward based on an extended statutory bar and this bar remained in effect until the termination of the PepsiCo acquisition. The FTC next secured a stipulation and then a preliminary injunction both of which prevented the Coca-Cola acquisition from going forward. The Georgia TRO was not the controlling relief that prevented the consummation of the acquisitions.

2. A Ruling on the Merits Became Immaterial.

In finding that the Royal Crown litigation played a role in the failed transactions, the district court also relied on the fact that Coca-Cola and Dr. Pepper could not have consummated their transaction until the court had ruled on the merits of Royal Crown's claims. (D.Ct. op. dated Jan. 16, 1987 at 7). While this statement is true, the district court failed to put this observation in context. First, this observation has no application to the PepsiCo/Seven-Up transaction because these parties had abandoned their acquisition before the TRO was extended and before a trial date was set. Second, once the July injunction was entered in favor of the FTC, the Coca-Cola/Dr. Pepper transaction was effectively terminated.

The purposes of the Hart-Scott-Rodino Act's notification procedures and subsequent waiting period are twofold. First, the information submitted pursuant to the statute is intended to provide the FTC with sufficient data for a preliminary determination of whether the proposed merger may violate the antitrust laws. Second, the procedure is intended to allow the FTC enough time to analyze the

reported data and seek a preliminary injunction without the difficulties attendant upon "unscrambling" a consummated transaction. Once the FTC votes to oppose a merger, it will file an administrative complaint. While the complaint is being prepared, the FTC often seeks a judicial TRO or preliminary injunction to enjoin the transaction pending an administrative resolution on the merits. This injunctive relief, authorized by 15 U.S.C. § 53(b), serves to avert post acquisition alterations which may make divestiture impractical or less effective and serves to undercut the economic incentives a firm might have to undertake the acquisition despite the odds that divestiture will eventually be ordered. Injunctions also create a significant impediment to the ultimate consummation of the merger. In order to obtain an injunction, the FTC need only show a likelihood of success on the merits and that the public equities justify such relief. In a practical sense, the granting of this injunction tolls the death knell for the challenged transaction because the parties to the merger usually cannot sustain its financial arrangements and terms for the period of years necessary for an administrative resolution. *See ABA Antitrust Section, Monograph 5, the FTC as an Antitrust Enforcement Agency: Its Structure, Powers & Procedures* 36, 73-74 & n. 273, Volume II (1981).

Because an FTC injunction indefinitely stalls an acquisition, once the FTC obtained such an injunction in this case, the existence of any other lawsuit challenging the propriety of the Coca-Cola/Dr. Pepper acquisition became a redundancy. In context, the fact that Coca-Cola and Dr. Pepper could not close before resolution on the merits of the Royal Crown litigation is irrelevant to the question of causation. A plaintiff may not collect attorney's fees for demanding of the defendant that which the defendant would have done

in any case. *Doe v. Busbee*, 684 F.2d 1375, 1380 (11th Cir.1982) (in civil rights case, plaintiffs may not recover attorney's fees where suit merely demands a state officer to do what officer would have done in any case).

3. Royal Crown's Prosecution was Inconsequential.

The district court also considered the "vigorous prosecution" of Royal Crown to be factually important in determining causation. Royal Crown did put a considerable amount of resources into its challenge to the PepsiCo and Coca-Cola acquisitions. From January to April 1, 1986, Royal Crown evaluated the competitive effects of the acquisitions. In April, Royal Crown prepared and submitted an *amicus curiae* brief to refute the government's *amicus* position in *Cargill, Inc.*, 107 S.Ct. 484. Royal Crown believed the brief necessary to protect its standing to challenge its competitors' acquisitions. This preparation preceded the complaint and application for a TRO in this case and the direct impact of this work on the appellants is questionable.

By May, 1986, Royal Crown began to identify witnesses and documentary evidence by interviewing various bottlers across the country. In June, Royal Crown filed a complaint and an application for a TRO. It then launched full-scale discovery "dispatching teams of lawyers to a number of locations to review the [appellants'] documents and simultaneously scheduled and commenced depositions of [appellants'] key officials and experts." [4] (D.Ct. Order at 3). This discovery effort resumed against Coca-Cola and Dr. Pepper after the district court's temporary stay of discovery expired.

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[4] None of this discovery focused on Philip Morris and Seven-Up.

While Royal Cown did expend a substantial amount of time, money and expertise, we find that its prosecution was not as "vigorous" or resolute as it might otherwise appear. Much of Royal Crown's time and money was spent in endeavors that preceded its application for a TRO. The mere "threat of litigation" does not entitle a party to attorney's fees. *Braafladt,* 778 F.2d at 1444. By the time Royal Crown filed its complaint, proceedings with the FTC had been continuing for some four or five months with all of the involved parties submitting thousands of documents. In fact, much of Royal Crown's document requests were for documents already produced to the FTC. (R4-81-83).

This is not a case in which the plaintiff acted "swiftly and decisively" to enjoin the acquisitions in question. *Cf. Grumman,* 533 F.Supp. at 1390 (plaintiff's swift action prevented takeover). Rather, Royal Crown elected to postpone litigation and "to maintain trial readiness" for some four or five months. Royal Crown admits that it did not immediately file its complaint because it feared that the FTC would not vote to block the mergers if the FTC believed that Royal Crown had already initiated such a challenge. On the other hand, Royal Crown states that it eventually had to file the motion for a TRO because it could not know how the FTC would vote and, therefore, it had to assume that the FTC would not oppose the mergers.

Timing the filing of a private antitrust suit does involve complex considerations. "Mergers first challenged in private suits have but rarely been attacked in independent [FTC] actions. . . . Conversely, few Government Section 7 proceedings have been followed by private . . . actions" *ABA Antitrust Section, Monograph No. 1, Mergers and the Private Antitrust Suit: The Private Enforcement of Section VII of the Clayton Act Policy and Law,* 19-20

(1977). In addition, "where the Government has sued or not sued to halt a given merger, the appropriate party [may seek] advantage from this fact," and courts may be inclined to give deference to the FTC's assessment of the propriety of a merger. *Id.* at 28. A court, however, is not required to give deference to an FTC assessment, and the FTC does sometimes bring its own action against acquisitions regardless of the existence of a private action. *Compare e.g., Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert denied*, 419 U.S. 883, 95 S.Ct. 150, 42 L.Ed.2d 123 (1974) with FTC Dkt. No. 9005, *Cargill, Inc., Trade Regulation Reporter*, transfer binder, Federal Trade Commission Complaints and Orders, 1976-1979, ¶ 20, 745 (January 21, 1975); *see also Grumman*, 533 F.Supp. at 1390 n. 10.

We appreciate that in knowing the workings of the FTC, Royal Crown felt obliged to make some tactical decisions. Royal Crown reasonably decided to maximize the chance that the FTC would take some action by postponing private litigation and, at the same time, filing its own complaint at the last minute to serve as insurance that the transactions would be challenged by someone in the event that the FTC failed to act. Justifiable strategy, however, does not justify attorney's fees. Under the statute, only proof that an individual has substantially prevailed will entitle that individual to an attorney's fee award. Royal Crown urged the FTC to act; it should not now be surprised that the action proved decisive.

Under Royal Crown's strategy, we recognize that the TRO was a necessary precaution. Had the FTC voted not to block the PepsiCo and Coca-Cola transactions and had the FTC agreed that under such circumstances it was unnecessary to hold the parties to their June 24 closing date,

the TRO *could have* played a crucial role because it would have prevented the parties from completing the transactions. The FTC, however, did oppose the transactions and did follow-up this opposition with a request for injunctive relief. The legal inquiry we make is based on whether the Royal Crown litigation was, *in fact*, a substantial factor causing the appellants' actions, not whether the litigation was prudent or would have been a substantial factor under a different set of circumstances.

Royal Crown urges us to consider the strength of the opposition to its motion for a TRO. *See F & M Schaefer Crp.*, 476 F.Supp. at 207. Royal Crown points to the very prominent attorneys who were dispatched from New York, Washington and Atlanta to argue against the TRO. How could it be, Royal Crown asks, that all these powerful attorneys would fly down to Columbus, Georgia to oppose a TRO that they considered inconsequential?

The answer, of course, is that at the time of the TRO hearing, the appellants had no way of knowing whether the TRO would be inconsequential or not. On the one hand, if the FTC voted not to block the mergers, the TRO would have been the only barrier preventing the appellants from closing. On the other hand, if the FTC voted to block the mergers, the TRO would add nothing to the "closing" equation. The appellants decided to fight the TRO in the hopes that the FTC would decide not to oppose the transactions. (R7-Tr. 63). Once again, we must decide the question of causation based on what actually occurred and not on what might have occurred.

Royal Crown chose to wait in the wings in the hopes that the FTC would take some definitive action. While such a strategy is sound in obtaining the ultimate results, it is not without consequences. The legal basis of Royal Crown's

claim is that it was a catalyst in getting the appellants to terminate their acquisitions. A lawsuit filed to safeguard one's position does not become a catalyst simply because the lawsuit serves as protection in the event that the FTC fails to act. If Royal Crown wished to play understudy to the FTC instead of taking the lead role, then it ran the risk that, despite its time and preparation, it would never have the opportunity to perform. Without a performance, Royal Crown cannot now expect a curtain call. Royal Crown filed a precautionary lawsuit and started the litigation wheels moving after much of the desired information had already been produced to the FTC. Such action is neither swift nor decisive and it is not enough to confer upon Royal Crown the status of "prevailing party."

## D. THE TOTALITY OF THE CIRCUMSTANCES

Royal Crown vigorously argues that the existence of the FTC action does not prevent its own action from being a cause of the acquisitions' failure. Royal Crown points to two cases, one from the district court of Alabama and one from this Circuit to support its contention that private plaintiffs can and should recover attorney's fees despite government action. *See United States v. Marengo County Commission*, 667 F.Supp. 786 (S.D.Ala.1987) and *United States v. Terminal Transport Co.*, 653 F.2d 1016 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1613, 71 L.Ed.2d 849 (1982). Royal Crown's reliance on these cases is misplaced In both *Marengo* and *Terminal* the private plaintiffs filed suit first, with the government subsequently filing suit in the same court. In both cases the lawsuits were consolidated and the private plaintiffs and the government thereafter worked together in challenging the defendants. Finally, in both cases the court noted that

the private plaintiffs attempted to avoid duplicative efforts so that the government's participation actually saved the defendants a great deal of money because fees could not be assessed for the government's legal work.

The facts of the present case are totally inapposite. Royal Crown and the FTC worked separately and filed lawsuits in separate courts. The two parties made no attempt to collaborate and indeed, the parties considered some of the issues involved in the two cases to be wholly separate. (R2-63-Ex. D at 15; R5 at 14-16). As a result, the two actions must be evaluated separately. Under the circumstances of this case, Royal Crown may not ride on the coattails of the FTC but must show that it also contributed, substantially, to the failure of the challenged acquisitions.

In an attempt to demonstrate its contribution, Royal Crown argues that it is virtually impossible that its litigation had zero effect on the appellants. "Some award is due so long as the plaintiff's actions made an important contribution to the improvement achieved." *Posada*, 716 F.2d at 1072. The district court agreed with Royal Crown noting:

> Undoubtedly the parallel FTC proceeding in the District of Columbia also played a role in the abandonment, but the Court regards the contention of the Defendants that the pendency of this private antitrust action in this court was of no concern to the Defendants and was not a motivating factor in their decision to abandon the merger [sic] to be unrealistic and incredible. If Dionysus had suspended two swords over the head of Damocles is it likely that Damocles would have been concerned about one but not the other?

(D.Ct. op. dated Jan. 16, 1987 at 6 n. 1).

The district court's analogy obscures the inquiry that courts are to make under section 16 of the Clayton Act. That inquiry requires us to undertake a factual analysis of whether the Royal Crown lawsuit significantly contributed to the abandonment of the acquisitions. The mere existence of a lawsuit, whether alone or proceeding at the same time as another lawsuit, is not enough. In cases where the defendant's actions unilaterally moot the pending lawsuit, we will deny attorney's fees if the defendant's conduct was " 'a wholly gratuitous response' " to the plaintiff's litigation. *Savidge v. Fincannon,* 836 F.2d 898, 905 (5th Cir.1988) (citations omitted) (evidentiary hearing required to determine whether appellant's litigation, a third party's litigation, or both, caused appellee's actions); *Braafladt,* 778 F.2d at 1444 (district court did not err in finding that a third party's litigation, and not the appellant's litigation, caused appellee's actions); *Iranian Students,* 639 F.2d at 1163 n. 4 (noting cases where a plaintiff's lawsuit was held not to contribute to the ultimate relief obtained).[5]

Royal Crown points only to the chronology of events to demonstrate a causal connection between its litigation and the ultimate result. It relies on speculation and argu-

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[5] *Martin* v. *Heckler,* 773 F.2d 1145, 1149 (11th Cir.1985) (en banc) is distinguishable from the instant case. In *Martin,* this court held that a civil rights plaintiff was a prevailing party despite the fact that the defendants voluntarily agreed to halt the challenged conduct. Although the defendants' decision occurred after the plaintiffs brought suit but before judgment, unlike this case, the plaintiffs provided the only challenge to the defendants' actions. In *Martin* "[w]e searched the record in vain to find *anything* that would show the plaintiffs' action was not necessary to bring about a change in policy." *Id.* (emphasis added). In this case, however, there is ample evidence to conclude Royal Crown's suit was not necessary to stop the proposed merger.

ment to prove its case. In no part of the chronology of events do we glean a link between the Georgia litigation and the ultimate actions of the appellants. While we do not doubt that the appellants would have worried about the Royal Crown litigation if that litigation had ever become a controlling prohibition against closing, such was never the case. In light of the chronology of events viewed in the context of the surrounding circumstances, we are left with a "definite and firm conviction" that the district court made a mistake in finding that the Royal Crown litigation played a significant role in the abandonment of the acquisitions. *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

## III. CONCLUSION

Our opinion today is not meant to discourage citizens from acting as "private attorney generals' in the enforcement of the antitrust laws. We appreciate that the purpose behind section 16 of the Clayton Act is to encourage private citizens to bring suit, to insure that the cost of doing so will not be deducted from any eventual award and to impose a further penalty on the losing party. *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d, 1407, 1423-24 (11th Cir.1987). At the same time, however, a plaintiff must do more than to bring a carefully timed lawsuit as a potential back-up to government action.

In an application for attorney's fees in a case where the defendants' actions moot the controversy and both a governmental agency and a private party sought relief, the inquiry into whether the private party's lawsuit was a cause or catalyst for the defendants' actions is intensely factual and must turn on more than the simple recitation of the chronology of events. Instead of submitting evidence on

the critical question of causation, Royal Crown relied on the Georgia district court record alone to establish that it was a "catalyst" and therefore entitled to attorney's fees. In the cases we have cited that are factually similar to this one and where fees were allowed, the plaintiff provided a factual basis upon which the district court could render an opinion. Because of the lack of proof in a case that does not lend itself to chronological inferences, the judgment of the district court is

REVERSED.

**Opinion of the District Court**

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 86-107-COL

ROYAL CROWN COLA CO.,

*Plaintiff*

VS.

THE COCA-COLA COMPANY, DR PEPPER CO., PEPSICO, INC., PHILIP MORRIS INCORPORATED, and THE SEVEN-UP COMPANY,

*Defendants*

FILED JAN. 16, 1987
L. BROADWELL

Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

OPINION

This is an action brought by Royal Crown Cola Co. ("Royal Crown") under the provisions of the Clayton Act to enjoin the contemplated acquisition by The Coca-Cola Company ("Coca-Cola") of Dr Pepper Co. ("Dr Pepper") and the acquisition by Pepsico, Inc. ("Pepsico") of The Seven-Up Company ("Seven-Up"). Both acquisitions have been abandoned, thereby making an ultimate determination on the merits unnecessary, and Royal Crown has now filed a motion seeking an order establishing procedures to deter-

mine the amount of attorneys fees and expenses to be awarded. The Defendants recognize that the Act provides for such an award, but contend that in the circumstances here presented an award would not be appropriate because they insist that this litigation was not a "substantial factor" in obtaining the relief sought.

Section 16 of the Clayton Act provides that:

> In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Thus, Congress has expressly made mandatory the awarding of an attorney's fee to a plaintiff that substantially prevails in a private antitrust action for injunctive relief.

It has been stated that the standard for determining whether an antitrust plaintiff "substantially prevails" under Section 16 of the Clayton Act consists of three considerations: (a) the situation immediately prior to the commencement of the suit, (b) the situation today, and (c) the role, if any, played by the litigation in effecting any changes between the two, and if the plaintiff was a "substantial factor" in obtaining the relief sought it should be found to be a substantially prevailing party entitled to an award of attorney's fees. *Grumman Corp.* v. *LTV Corp.*, 533 F. Supp. 1385 (E.D.N.Y. 1982).

This is the same standard that is regularly applied to determine "prevailing party" in making awards of attorney's fees in Civil Rights cases under 42 U.S.C. § 1988. In a § 1988 case the Court of Appeals for the Eleventh Circuit has determined that the "prevailing party" standard requires only that the plaintiff "has received substantially the relief requested or has been successful on the central issue."

*Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985). Stated otherwise, the prevailing party must show that its "lawsuit was a catalyst motivating defendants to provide the primary relief sought in a manner desired by litigation." *Martin*, 773 F.2d 1145, 1149, quoting from *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981).

Moreover, a final judgment on the merits is not a prerequisite for an award of attorney's fees under Section 16. *Grumman Corp. v. LTV Corp., supra*, at 1387 (awarding an attorney's fees even though defendant called off takeover attempt). *Robinson v. Kimbrough*, supra, was a case which arose in this court seeking a revision of jury lists. This Court never issued a temporary restraining order or preliminary injunction and never had to consider the case on the merits because the defendants took the action desired by the plaintiffs soon after the suit was filed. This Court denied the plaintiff's application for an award of attorney's fees and the Court of Appeals reversed, stating that although the plaintiffs never obtained any judicial relief, by injunction or otherwise, they nevertheless could be regarded as "prevailing parties" and entitled to an attorney's fee award.

The Court has given consideration to the briefs submitted and oral arguments made by counsel and has concluded that in this case the situation which existed before Royal Crown filed suit, the situation as it now exists, and the intervening course of events clearly show that Royal Crown was both a "substantial factor" and a "catalyst" in motivating the Defendants to terminate their planned acquisitions. Royal Crown filed this action on June 19, 1986. Prior to that time both the Coca-Cola acquisition of Dr Pepper and the Pepsico acquisition of Seven-Up were to be consummated at the end of the Hart-Scott-Rodino waiting period which is required

for all large mergers. In conjunction with its complaint, Royal Crown, at the same time, filed a motion for a temporary restraining order and at that time no action had been taken by any government agency to challenge these transactions, and prospects for any such action were uncertain. The Court conducted a hearing on June 20 and issued the requested temporary restraining order that prevented immediate consummation of the proposed acquisitions after the waiting period, and at the same time, at the request of counsel for Philip Morris and Seven-Up, set a hearing on the application for preliminary injunction to begin just ten days later on June 30. Later the same day (June 20), after this Court had issued the temporary restraining order, the Federal Trade Commission (FTC) decided that it would institute its own proceeding to challenge the acquisitions.

After obtaining the temporary restraining order Royal Crown immediately launched full-scale discovery to prepare for the preliminary injunction hearing, dispatching teams of lawyers to a number of locations to review the Defendants' documents and simultaneously scheduled and commenced depositions of the Defendants' key officials and experts. After some of the depositions had already begun, Philip Morris, Seven-Up, and Pepsico announced on June 23 that their proposed transaction had been cancelled. In light of this development the temporary restraining order which had been entered by this Court on June 20, insofar as it applied to those Defendants, was vacated on June 26 and therefore did not continue in effect as a preliminary injunction against them. After the announcement on June 23 above mentioned the Royal Crown lawyers who had been assigned to review the documents of Pepsico, Philip Morris, and Seven-Up were redeployed to continue Royal Crown's discovery efforts against Coca-Cola and Dr Pepper.

Because this Court had already issued a temporary restraining order it was not necessary for the FTC to seek immediate judicial relief. Rather, the FTC acceded to Coca-Cola's request that a preliminary injunction hearing be scheduled in the United States District Court for the District of Columbia in the middle of July. After having obtained a tentative hearing date of mid-July in that court, Coca-Cola then represented to this Court that there was an unavoidable scheduling conflict and asked this Court to postpone the preliminary injunction hearing in this case, which, as above noted, had already been set for June 30. In an effort to accommodate Coca-Cola's difficulties, this Court agreed to adjourn the June 30 preliminary injunction hearing under the following conditions: (1) this Court's original restraining order would "continue in effect as a preliminary injunction" until a plenary hearing on the merits; (2) a one week trial on the merits would be held in Columbus beginning August 25; and (3) expedited discovery would be suspended temporarily to resume again as of Monday, July 28. The Court made it clear that the revision of schedule of events in this court as above indicated was solely for the purpose of accommodating counsel for Coca-Cola and Dr Pepper and that the proceedings in this action in this court would not otherwise be governed or affected by the proceedings in the District of Columbia court or by the determinations which might be ultimately made by that court.

The parallel FTC action in the District of Columbia proceeded to a preliminary injunction hearing on July 16-18. Full-scale discovery in the action pending in this court recommenced on July 28 looking toward the August 25 trial on the merits. That full-scale discovery continued even after the District of Columbia court on July 31 reached the stage that this Court had previously reached by issuing an

order granting the FTC's motion for preliminary relief. Finally, following several more days of discovery activity by Royal Crown and in the course of Royal Crown's deposition of one of the Coca-Cola economic experts, Coca-Cola and Dr Pepper announced on August 5 that the proposed acquisition had been abandoned.

Royal Crown does not contend, and this Court does not conclude, that the action then pending in this court was the sole cause for the Defendant's abandonment of the challenged acquisitions. Undoubtedly the parallel FTC proceeding in the District of Columbia also played a role in the abandonment, but the Court regards the contention of the Defendants that the pendency of this private antitrust action in this court was of no concern to the Defendants and was not a motivating factor in their decision to abandon the merger to be unrealistic and incredible.[1] After all, it was Royal Crown who obtained the first judicial relief and indeed the controlling relief throughout the legal challenge to the proposed transactions, and the mere existence of another suit later instituted which sought the same injunctive relief does not warrant denying or diminishing Royal Crown's right to an award of attorney's fees.[2] In *Grumman*

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[1] If Dionysius had suspended two swords over the head of Damocles is it likely that Damocles would have been concerned about one but not the other?

[2] Congress amended Section 16 of the Clayton Act precisely in order to encourage "private parties (whether consumers, businesses, or possible competitors)" to bring meritorious antitrust injunction cases by guaranteeing that they would not "have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect." H.R. Rep. No. 499-Part I, 94th Cong. 2d Sess. 19-20 (1975), *reprinted in* 1976 U.S. Code Cong. & Admin. News 2572, 2589. The Supreme Court has explained that Congress designed the antitrust laws so that

*(footnote continued on following page)*

*Corp.* v. *LTV Corp., supra,* it was held that a subsequent FTC decision to challenge a merger did not defeat the right of the plaintiff in a private antitrust suit to attorney's fee under Section 16 of the Clayton Act. The Coca-Cola-Dr Pepper transaction could not be completed until this Court ruled on its merits regardless of any decision made by the District of Columbia court as a result of the July preliminary injunction.

In summary, the proposed acquisitions were moving forward toward imminent consummation before Royal Crown filed its action in this court and now they are terminated, and this is precisely the relief which Royal Crown sought. The Court determines as a matter of fact that the injunctive relief obtained by Royal Crown in this action as well as Royal Crown's vigorous prosecution and discovery efforts constituted a substantial factor and a catalyst in motivating the Defendants to terminate their acquisitions, and concludes as a matter of law that in this factual setting Section 16 of the Clayton Act thus entitles Royal Crown to an award of attorney's fees and expenses, and the Court will make such an award.

Royal Crown has submitted an order which it suggests should be entered establishing the procedures to determine the amount of fees and expenses to be awarded. The Court notes that Coca-Cola and Dr Pepper in their brief have stated that "[s]hould this Court determine that Royal Crown

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*(footnote continued from preceding page)*

government suits and private suits for injunctive relief "may proceed simultaneously or in disregard of each other." *United States v. Borden Co.*, 347 U.S. 514, 518-519 (1954). Had Congress intended that private plaintiffs not be permitted to file suit or recover attorney's fees when the government also challenges a transaction, it would have so provided. *See United States* v. *Terminal Transport Co.*, 653 F.2d 1016, 1021 (5th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

is entitled to an award of attorneys' fees, Coca-Cola and Dr Pepper respectfully request that they be granted an opportunity to address the provisions of Royal Crown's proposed order and to offer the Court a form of an appropriate order at that time." The Court will welcome any suggestions which any or all of the Defendants may wish to make, such submissions to be filed with the Court by January 31, 1987.

This 16th day of January, 1987.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

## Order of the District Court

UNITED STATES DISTRICT COURT

M.D. GEORGIA, COLUMBUS DIVISION
Civ. A. No. 86-107-COL.
Dec. 11, 1987

ROYAL CROWN COLA CO.,

*Plaintiff,*

v.

THE COCA-COLA COMPANY, DR PEPPER CO., PEPSICO, INC., PHILIP MORRIS INCORPORATED, and THE SEVEN-UP COMPANY,

*Defendants.*

Successful plaintiff in antitrust action against soft drink companies sought attorney fees. The District Court, Elliott, J., held that: (1) fees would be apportioned on the basis of various defendants' participation in litigation during different time periods; (2) plaintiff was entitled to recover fees incurred in advocacy before the FTC and before the Supreme Court in a case involving the issue of standing in antitrust action; (3) plaintiff was entitled to $1.243 million in fees; and (4) plaintiff was entitled to $112,229 in fees for time spent in preparing fee application.

Ordered accordingly.

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Albert W. Stubbs, Hatcher, Stubbs, Land, Hollis & Rothschild, Columbus, Ga., David L. Foster, Willkie Farr & Gallagher, New York City, James H. Wallace, Jr., Wiley & Rein, Washington, D.C., for plaintiff.

Trammell E. Vickery, Hansell & Post, Atlanta, Ga., Ronald G. Carr, Morrison & Foerster, Washington, D.C., Victor S. Friedman, Fried, Frank, Harris, Shiver & Jacobson, New York City, for Dr. Pepper.

Abe Krash, Daniel A. Rezneck, Robert S. Thorpe and David E. Green, Arnold & Porter, Washington, D.C., for Philip Morris Companies, Inc. and The Seven-Up Co.

Richard A. Marchetti, Page, Scrantom, Harris & Chapman, Columbus, Ga., Richard T. Colman, P.C., Howrey & Simon, Washington, D.C., for Pepsico Inc.

Frank C. Jones, King & Spalding, Atlanta, Ga., Coudert Bros., Gordon B. Spivak, Jonathan M. Jacobson, New York City for Coca Cola.

## OPINION AND ORDER AWARDING ATTORNEYS' FEES AND EXPENSES

ELLIOTT, District Judge.

Although the complaint in this complex antitrust action was not filed until June, 1986, the actions which prompted it and the activities which preceded the filing began months earlier. Historically, Royal Crown Cola Co. (Royal Crown), The Coca-Cola Company (Coca-Cola), Dr Pepper Co. (Dr Pepper), Pepsico, Inc. (Pepsico) and The Seven-Up Company (Seven-Up) have been competitors in the soft drink industry. In January, 1986, Philip Morris Incorporated (Philip Morris) announced that Pepsico would purchase from Philip Morris the Seven-Up soft drink business. Counsel for Royal Crown immediately began the legal and factual research necessary to determine whether a challenge to the Pepsico acquisition was appropriate pursuant to Sec. 7 of

the Clayton Act, 15 U.S.C. Sec. 18. Then, less than a month later, in February, 1986, Coca-Cola announced that it had agreed to acquiure Dr Pepper. This required a thorough assessment of the facts of the Coca-Cola acquisition and a reassessment of the competitive effects of both acquisitions.

During the course of Royal Crown's research and the drafing of a complaint and preparation of briefs to be submitted in support of a request for injunctive relief the Federal Trade Commission (FTC) began an administrative investigation of the Pepsico and Coca-Cola acquisitions and this provided Royal Crown with an opportunity to present its views to the FTC concerning the anticompetitive effects of the acquisitions on Royal Crown. Counsel for Royal Crown made several presentations to members of the FTC and members of the FTC staff seeking to induce the FTC to attack the transactions, these presentations being considered by Royal Crown to be apropriate elements of its overall attack on the transactions.

Because of the continuing uncertainty about the results of the FTC investigation, and when the waiting period mandated by law would expire, counsel for Royal Crown had to be prepared to file its injunction action on a moment's notice, it appearing that the parties were prepared to consummate the proposed acquisitions immediately after FTC clearance. Deciding that it could not safely wait any longer, Royal Crown filed its complaint seeking to enjoin the acquisitions on June 19, 1986.

This was the beginning of intense litigation activity [1] and further monitoring of the FTC proceedings, the ultimate result being that all of the Defendants abandoned the pro-

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[1] A brief summary of this activity is set out in this Court's opinion of January 16, 1987.

posed acquisitions, this Court in the meantime having issued a temporary restraining order with regard to both acquisitions and a preliminary injunction with regard to the Coca-Cola acquisition.

Thereafter, Royal Crown filed a petition seeking an award for attorney's fees and expenses which was vigorously opposed by the Defendants. On January 16, 1987, this Court ruled that "the injunctive relief obtained by Royal Crown in this action as well as Royal Crown's vigorous prosecution and discovery efforts constituted a substantial factor and a catalyst in motivating the Defendants to terminate their acquisitions," and that "in this factual setting Section 16 of the Clayton Act thus entitles Royal Crown to an award of attorneys fees and expenses."

Since that time all parties have submitted briefs, affidavits and, in some instances, reply briefs, making their suggestions to the Court concerning an appropriate award, and this opinion will set out the Court's determination.

Royal Crown's initial memorandum setting out the amount of fees and expenses claimed for services billed through March 31, 1987, was filed on April 23, 1987, and the claim is for $1,612,591 [2] ($1,326,702 being allocated to attorneys' fees and $285,889 being allocated to costs and expenses), but there have been some developments in the case since that time which require adjustment. Even so, the Court will analyze the claim as originally filed and then make the appropriate adjustments.

Royal Crown has broken its total claim down in such manner as to set forth the share of the claim assessed by it against each Defendant, the amounts being determined by dividing the litigation into four time periods, according to

[2] A supplemental claim for additional fees for the period March 31, 1987, to October 1, 1987, increased this figure to $1,733,879.

which acquisitions were then pending, and allocating to each Defendant only its share of the fees and expenses incurred. Being familiar with the history of the matter and what transpired during the respective time periods, the Court finds the allocations to be reasonable and adopts them.

We are initially reminded that in making an award of attorneys' fees we are to follow the guidelines set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), and, where appropriate, apply the criteria there listed.

*The Time and Labor Required*

Counsel for Royal Crown were required to devote extensive time and labor to this case.

*The Novelty and Difficulty of the Questions*

This antitrust case was quite complex and exceedingly difficult. It was a matter of major importance to all of the parties and had nationwide implications.

*The Skill Requisite to Perform the Legal Service Properly*

Counsel were required to exercise a high degree of skill in handling this case properly and it is obvious that they did so.

*The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case*

In accepting employment one of the law firms representing the Plaintiff was effectively precluded from other employment for a considerable period of time. This feature will be herinafter discussed more fully.

*Order of the District Court*

*The Customary Fee*

The customary fees charged by attorneys engaged in complex antitrust work are usually at the higher range of fees charged in the legal profession, and the fees claimed by Plaintiff's counsel in this case are well within that range.

*Whether the Fee is Fixed or Contingent*

No contingent fees are involved in this case.

*Time Limitations Imposed by the Client or the Circumstances*

The time limitations imposed by this litigation on counsel at various stages were severe.

*The Amount Involved and the Results Obtained*

The amount involved here was quite substantial and the Plaintiff obtained the complete relief sought.

*The Experience, Reputation, and Ability of the Attorneys*

All of the attorneys involved in this case, those representing Royal Crown and those representing the various Defendants, are lawyers of wide experience, excellent reputation, and unquestioned ability.

*The "undesirability" of the Case*

Not applicable.

*The Nature and Length of the Professional Relationship with the Client*

Not applicable.

*Awards in Similar Cases*

While no two antitrust cases are alike and seldom similar, it is the Court's view that the award which will be hereinafter made is reasonable in light of awards made in other antitrust cases.

The Court finds that the amount of the fees paid by Royal Crown to its attorneys was reasonable and should be reimbursed in full, except in those instances in which the Court determines that no fee should be allowed or that there should be an adjustment because of a special circumstance.

This specialized and sophisticated antitrust action, with nationwide implications, required all parties to retain counsel with experience and expertise in such matters and each such counsel's normal billing rates should apply unless the fee arrangement was negotiated in the open market, in which event the fee may be greater or less than it would be based on the hourly rate.

Royal Crown was represented by three law firms: Willkie Farr & Gallagher of New York City; Wiley, Rein & Fielding of Washington, D.C.; and Hatcher, Stubbs, Land, Hollis & Rothschild of Columbus, Georgia; and members of these firms have submitted affidavits and detailed statements justifying the fees paid to them by Royal Crown. The hourly rates charged by Willkie Farr & Gallagher are reasonable because they are within the range of fees charged by New York law firms and are the rates customarily charged to other clients of that firm. The hourly rates charged by Wiley, Rein & Fielding are reasonable because they are within the range of fees charged by Washington law firms and are the rates customarily charged to other clients of that firm. The fees charged by Hatcher, Stubbs, Land, Hollis & Rothschild were based upon hourly rates customarily

charged to other clients of that firm, augmented by a lump sum payment required by an advance contractual arrangement between the firm and Royal Crown, the purpose of which was to compensate the firm for the unusual demands made upon it by the press of time, the result of which was to effectively preclude the firm from undertaking other business for a period of several weeks. This is one of the *Johnson* criteria and the arrangement was made by Royal Crown in the open market when it had no assurance that it would ever be reimbursed.

The total of the fees originally claimed to have been paid by Royal Crown to its team of attorneys was $1,326,702, but, upon later discovery that clerical errors in computation amounting to $1,657 had been made, this figure was reduced to $1,325,045.

Two of the objections which have been raised by the Defendants to Royal Crown's application concern discrete activties undertaken by Royal Crown which the Defendants contend were unnecessary and therefore noncommpensable. Specifically, the Defendants oppose Royal Crown's request for reimbursement of fees related to its advocacy before the FTC and its *amicus* participation in the case of *Cargill, Inc. v. Monfort of Colorado, Inc.*, — U.S. —, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986).

In urging a denial of Royal Crown's time at the FTC prior to the time of the filing of its complaint in this court the Defendants contend that Royal Crown has not met the standard articulated in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, — U.S. —, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) wherein it is stated that

> "[F]or the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work

> must be 'useful and of a type ordinarily necessary' to secure the final result from the litigation."

*Id.* 106 S.Ct. at 3096 (quoting *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234, 105 S.Ct. 1923, 1928-29, 85 L.Ed.2d 233 (1985). So, under *Delaware Valley*, Royal Crown deserves compensation for its advocacy at the FTC if such advocacy was both "useful" and "ordinarily necessary" in thwarting the proposed acquisitions. The Court determines that this advocacy was useful and necessary for it is clear that if the FTC had decided for political reasons not to file suit, Royal Crown would have faced the overwhelming resources of the four largest concentrate manufacturers and seven nationally prominent law firms and would have had to displace the procompetitive presumption that would have followed by the FTC's approval of the acquisitions. These would have been formidable obstacles, and no prudent antitrust lawyer would forego a reasonable opportunity to avoid them. Not to have advocated before the FTC would have been imprudent as a matter of legal strategy.

Royal Crown's advocacy in the Supreme Court in the *Cargill* case was also directly related to this action because in that case the United States Department of Justice and the Federal Trade Commission had urged the Supreme Court to adopt a rule "denying competitors standing to challenge acquisitions on the basis of predatory pricing theories." In an effort to preserve its option to challenge the Seven-Up and Dr. Pepper acquisitions on a predator-related theory Royal Crown had argued against the Government's position in *Monfort*. In its decision the Supreme Court sided with Royal Crown's position and declined to adopt a broad bar against competitor standing. The significance of the question of competitor standing as related

to this case became apparent during the course of the hearing conducted by this Court with regard to Royal Crown's request for a restraining order when counsel for one of the Defendants specifically urged the Government's position in the *Monfort* case to contend that Royal Crown had no standing to challenge the proposed acquisitions. Had the Government's position prevailed in *Monfort*, resulting in the Supreme Court's fashioning a broad bar against competitor standing, Royal Crown may have missed its option to bring this case. To preserve that option was undoubtedly reasonable and necessary under the *Delaware Valley* standard.

Royal Crown undertook its FTC and *Monfort* advocacy solely to block the proposed acquisitions, and because Royal Crown's work on each of these matters was directly related to its success in this court the fees associated with that work are compensable.

Another objection raised by the Defendants relates to whether fees associated with certain personnel are compensable. Specifically, they seek to exclude the request for fees covering paralegals and summer law clerks. It is the Court's view that this objection is not well-founded because the use of paralegals and summer law clerks substantially reduced the number of attorney hours which would otherwise have been required and consequently the overall cost of this litigation, and courts generally favor the use of such personnel and grant fees for their time as an inducement to increase their utilization in complex litigation.

The Court is convinced, as the Defendants contend, that when three separate law firms are working on a case at the same time it is inevitable that there is an amount of duplication of effort which results in some duplicate billing for

services. It is impossible to demonstrate precisely when it occurs, or where it occurs, but it does occur, and has occurred in this case. No exact figure can be determined as an offset against the total billings, but based upon the Court's experience and observation it is felt that 5% of the total is appropriate in this case, and the application of this percentage results in a deduction of $66,252.

It also appears that counsel billed Royal Crown for time spent in media relations (preparing press releases, etc.) and in lobbying Congress to encourage opposition to the planned acquisitions while this case was pending, and that Royal Crown was billed for the time spent by counsel in monitoring the administrative complaint and opposing the dismissal of the complaint before the FTC *after* they had obtained injunctive relief in this court and after this case had been concluded. These were perfectly legitimate endeavors but they had no bearing on the merits of this action and therefore are not compensable. The Court's best estimate is that these items total approximately $10,000 and should be disallowed.

Further, it appears that counsel billed Royal Crown for time spent monitoring other private litigation involving these transactions as well as various investigations by state agencies regarding the transactions. The time spent on these matters did not contribute to the results of this litigation and the Defendants are not obligated to reimburse the Plaintiff for fees paid for this activity. The Court's best estimate is that these billings total approximately $5,000 and are disallowed.

So, at this point we have determinated that the valid claim which may be made by Royal Crown for fees paid to its attorneys through March 31, 1987, is $1,243,793, and to this there must be added the amount it is entitled to claim for costs and expenses.

As has already been noted, $285,889.64 of Royal Crown's total claim is for reimbursement for costs and expenses incurred by its counsel. The items claimed are described as follows:

| | |
|---|---|
| Expert Witness Fees | $69,965.63 |
| Managing Attorneys' Office | 1,157.50 |
| Library | 1,612.50 |
| Lexis | 23,703.75 |
| Secretarial Overtime | 4,916.25 |
| Word Processing | 11,740.68 |
| Proof Readers | 831.25 |
| Telephone | 1,754.77 |
| Telex | 23.21 |
| Messengers | 3,323.80 |
| Postage | 171.29 |
| Air Freight | 2,169.78 |
| Travel | 43,894.48 |
| Duplicating | 65,308.26 |
| Conference Services | 1,390.61 |
| Car Fare | 6,776.03 |
| Meals | 1,753.77 |
| Data Acquisition | 9,163.08 |
| Database Research | 1,795.30 |
| Supplemental Paralegel | 17,435.00 |
| Transcript Costs | 2,247.00 |
| Special Services | 1,344.51 |
| Court Reporters | 123.83 |
| Car Rentals | 237.50 |
| Local Counsel Fee | 771.38 |
| Filing & Recording Costs | 212.00 |
| Miscellaneous Expenses and Disbursements Not Spefically Categorized | 12,066.50 |

In light of the recent decision by the Supreme Court in *Crawford Fitting Co. v. Gibbons*, — U.S. —, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987), the only items above listed which may be properly claimed for reimbursement are:

| | |
|---|---|
| Transcript Costs | $2,247.00 |
| Court Reporters | 123.83 |
| Local Counsel Fee | 771.38 |
| Filing and Recording Costs | 212.00 |
| Total | $3,354.21 |

The other items claimed are disallowed.

When added to the attorneys' fee total previously determined, the amount which Royal Crown may validly claim for attorneys' fees and cost and expense disbursements as of April 23, 1987, is $1,247,147, and the proportionate shares of responsibility of the respective Defendants based upon the previously approved allocation formula would be:

| | | |
|---|---|---|
| Coca-Cola | $ 366,805 | (29.41152%) |
| Pepsico | 256,768 | (20.58844%) |
| Dr. Pepper | 366.805 | (29.41152%) |
| Seven-Up | 256,768 | (20.58844%) |
| | $1,247,146 | |

Since March 31, 1987, Royal Crown has incurred additional attorneys fee charges and expenses in connection with the active litigation of its claim for attorneys' fees and expenses and has filed a supplemental request for an additional award of $121,288 ($112,229 being allocated to attorneys' fees and $9,058.71 being allocated to expenses). The expense items claimed are described as follows:

| | |
|---|---|
| Photocopying | $1,109.70 |
| Couriers and delivery | 232.00 |
| Database Research | 137.25 |
| Long Distance Telephone Calls | 417.83 |
| Telecopier Charges | 86.28 |
| Postage | 47.08 |
| Xeroxing | 70.35 |
| Computer Research | 58.15 |
| Federal Express Charges | 29.75 |
| Dirbursements Not Specifically Categorized | 6,870.32 |

In the Court's view none of these expense items are reimbursable and are therefore disallowed. This leaves the figure of $112,229 which is claimed for attorneys' fees, and the Court finds this amount to be adequately supported and reasonable in the circumstances, and since there is no reason to make any distinction between the four Defendants with regard to this figure, 25% of the amount of these attorneys' fees ($28,057) is chargeable to each Defendant and this makes the share of the total claims, as supplemented, chargeable to the respective Defendants as follows:

| | |
|---|---|
| Coca-Cola | $ 394,862 |
| Pepsico | 284,825 |
| Dr. Pepper | 394,862 |
| Seven-Up | 284,825 |
| | $1,359,374 |

Consistent with the foregoing determination, it is directed that judgments be entered in favor of Royal Crown Cola Co. against The Coca-Cola Company in an amount of $394,862

and against Pepsico, Inc. in the amount of $284,825 and against Dr. Pepper Co. in the amount of $394,862.

The Court takes note of the fact that during the pendency of this matter Royal Crown and Seven-Up entered into a settlement agreement, in consequence of which Royal Crown has dismissed its claims against Seven-Up.

**Judgment on Rehearing and Rehearing En Banc**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT
No. 88-8014

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ROYAL CROWN COLA CO.,

*Plaintiff-Appellee,*
*Cross-Appellant,*

versus

THE COCA-COLA COMPANY,
PEPSICO, INC., and DR. PEPPER CO.,

*Defendants-Appellants.*
*Cross-Appellees.*

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FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FEB 9 1990
MIGUEL J. CORTEZ, *Clerk*

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 13, 11 Cir., 1989, — F.2d —).
(February 9, 1990)

*Judgment on Rehearing and Rehearing En Banc*

Before

JOHNSON and CLARK, Circuit Judges, and
ZLOCH*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

SHAMUS A. CLARK
United States Circuit Judge

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* Honorable William J. Zloch, U.S. District Judge for the Southern District of Florida, sitting by designation.